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No.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

CITY OF ALCOA and DAVID SWITZER, manager of Blount Electric System and employee of the CITY OF ALCOA,
Petitioners

v.

ELIZABETH MYERS, on behalf of herself and her three minor children, DEBBIE LYNN DIXON, JOHN GARFIELD DIXON, JR., and CONNIE SUE DIXON,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

The Court of Appeals ruled that a customer of a municipally owned public utility has a property right in receiving stolen electricity through the use of a stolen meter which had not been installed by the utility company, nor authorized to be installed by the utility company, and that the municipally owned public utility may not remove the stolen meter from its electric line without a pretermination hearing, under the Fourteenth Amendment to the Constitution of the United States, relying upon *Memphis Light, Gas & Water Division v. Craft.* The questions presented in this Petition are:

1. Does a customer of a municipally owned public utility have a property right in receiving stolen electricity?
2. If a customer has a property right in receiving stolen electricity from a municipally owned public utility, does the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States require a pretermination hearing before a municipally owned public utility may remove from its line a meter not installed by the utility company, nor authorized to be installed by a utility company, which meter had been stolen from another public utility company?
3. When the only issue on appeal is whether or not the trial court erred in sustaining a motion for summary judgment on behalf of the Defendants, can the Appellate Court remand for determination of damages only, thus depriving the Petitioner of its right to defend on liability?

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IN THE

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No.

CITY OF ALCOA and DAVID SWITZER, manager of Blount Electric System and employee of the CITY OF ALCOA,

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v.

ELIZABETH MYERS, on behalf of herself and her three minor children, DEBBIE LYNN DIXON, JOHN GARFIELD DIXON, JR., and CONNIE SUE DIXON,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioners, City of Alcoa and David Switzer, manager of Blount Electric System and employee of the City of Alcoa, ("City"), respectfully pray that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered January 9, 1985, and the Order denying Petition to Rehear entered March 6, 1985, in favor of Respondents, Elizabeth Myers, Debbie Lynn Dixon, John Garfield Dixon, Jr., and Connie Sue Dixon ("Myers").*

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*The named parties are the only parties to this litigation.

OPINION BELOW

The Opinion and Judgment of the Court of Appeals, which has been reported at 752 F.2d 196, appears in Appendix A to this Petition. The Order denying the Petition for Rehearing appears in Appendix B to this Petition. The Decision rendered by the United States District Court for the Eastern District of Tennessee on Petitioners' Motion for Summary Judgment appears in Appendix C. The Judgment appears in Appendix D.

JURISDICTION

The Opinion and Judgment of the Court of Appeals for the Sixth Circuit was entered on January 9, 1985. The Order denying the Petition for Rehearing was entered on March 6, 1985. This Petition for a Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 USC 1254(1).

CONSTITUTIONAL QUESTION INVOLVED

This case concerns the "property right" and procedural "due process" rights under the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

This Petition arises from the Sixth Circuit's reversal of a Motion for Summary Judgment which had been filed by the petitioners, City of Alcoa and David Switzer, manager of Blount Electric System and employee of the City of Alcoa, in *Elizabeth Myers, on behalf of herself and her three minor children, Debbie Lynn Dixon, John Garfield Dixon, Jr., and Connie Sue Dixon vs. City of Alcoa and David Switzer, manager of Blount Electric System and employee of the City of Alcoa*, Civil Action No. 3-83-435 (E.D.Tenn.), an action filed by Elizabeth Myers, et al, on July 12, 1983. The Myers' Complaint alleged that the City terminated her electrical service without a pretermination hearing or notice of hearing and denial of resumption of service in violation of 42 USC §1983 and the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that the City failed to give notice of a pretermination hearing, failed to provide an opportunity for a pretermination hearing, and failed to

provide for a hearing before denying the right to reconnect, all required by the decision of this Court in *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978) [hereinafter referred to as *Craft*].

The Complaint alleged that the City, through its rules and regulations, provided for the discontinuance of service for the theft or the appearance of theft devices in its lines but that no provision was made for a hearing before the discontinuance of the service. Myers prayed for an injunction, the resumption of service "under reasonable safeguards to protect the interest of each party," damages, court costs, attorney fees and other relief.

The injunction was denied and the City answered averring *inter alia* that the residence of Myers was using a stolen meter, which belonged to the Knoxville Utilities Board, [hereinafter referred to as KUB], installed without authority and installed upside down, and that this, coupled with the use of the tampered meter pan, was such so that the electricity of the City was being stolen. The City admitted no notice or pretermination hearing was held prior to the removal of the stolen meter from the Myers' residence. The City made a Motion for Summary Judgment (Rule 56, Fed. R. Civ. P.) supporting it with affidavits and a copy of its rules and regulations providing for the discontinuance of service for reasons other than a billing dispute between the City and a customer. Myers made a Counter-Motion for Summary Judgment. The District Court overruled both motions. On December 7, 1983, a pretrial conference was had pursuant to Rule 16, Federal Rules of Civil Procedure, at which time the Court, without objection, stated that the issue in the case was:

> Did the defendant violate the civil rights of plaintiff in terminating service of electricity to plaintiff by reason of an alleged unlawful metering device inserted in the service wires?

On December 9, 1983, the parties filed a Stipulation [See Appendix F], which stipulated, among other things, that the City on April 20, 1983, found that its meter, which had been installed on April 5, 1983, had been replaced with a meter which had been stolen from the KUB and that the meter pan on which the meter was installed had been tampered with so that the meter could be removed and installed without breaking the seal on the meter pan. The unauthorized and stolen KUB meter was removed. A motion by City to reconsider its Motion for Summary Judgment

was filed on December 9, 1983. The Honorable Robert L. Taylor, United States District Judge, filed a Memorandum Opinion and entered his Order sustaining the City's Motion for Summary Judgment on December 16, 1983. The District Court ruled that the City was the victim of a theft and that Myers benefited from the theft. The Court further held that the City was entitled to determine the facts before it exposed itself to additional loss, especially since Myers was unable to explain the theft. The Court also found that although there may be a dispute as to who stole the electricity, it was not disputed that electricity was being stolen at the Myers residence[1]. This, the Court held, was sufficient cause to terminate electric service inasmuch as a person has no due process rights to stolen property.

On appeal, the Sixth Circuit reversed the summary judgment, holding that this Court's decision in *Craft*, said that Tennessee law accorded a property right in the receipt of electric service and that a municipally owned public utility may not terminate service "at will." It attempted to distinguish this Court's further holding in *Craft*, that a Tennessee municipally owned public utility may terminate service "for cause." The Sixth Circuit went on to hold that once it was determined that a customer had a property right, the due process considerations did not cease to exist even in the face of a *prima facie* claim, and following its decision of *Lee v. Western Reserve Phychiatric (sic) Habilitation Center, et al*, 747 F.2d 1062 (6th Cir. 1984) held that "once a property interest is established Federal Due Process attaches to protect the interest from being extinguished without some type of pretermination hearing." Utilizing the decision of this Court in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), the Sixth Circuit held that Myers was entitled to a Due Process hearing. The Court held that Myers was entitled to continued electric service, notwithstanding that she benefited from stolen electricity, even though she did not have any right to the stolen meter which resulted in her receiving stolen electricity.

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[1] The Court did not rule whether or not Myers stole the electricity. The issue was not material to the District Court's ruling, but it became important to the Sixth Circuit even though based on an incomplete record of evidence. See Questions Presented 3. to this Petition for Certiorari.

The result of the Sixth Circuit's decision is that a customer of a municipally owned public utility has a property right in stolen electricity and that a municipally owned public utility company may not remove a stolen meter serving the residence without a pretermination hearing.

The case was reversed and remanded with instructions to enter an order accordingly and to determine the damages, if any, to which Myers was entitled. No trial or further proceeding on any question of liability or defense was permitted in the order of reversal and remand. A Petition for Rehearing was filed by the City. In it the City argued that the Sixth Circuit decided an issue which was not before it on appeal, decided the lack of knowledge of the theft device based upon the hearsay acquittal of the state criminal charge and that the decision of the Court deprived the City of its right to offer proof on the questions of both liability and damages. On March 6, 1985, the Sixth Circuit denied the Petition to Rehear; however, Judge Wellford concurred with the City that the case should be remanded for disposition on all issues, including the District Court making an initial determination of what process was due and whether the City violated any such due process, based on the unusual facts of this case[2].

[2]Judge Wellford was the United States District Judge before whom *Craft* was decided. Judge Peck, also on the panel of this case, wrote the Sixth Circuit opinion in *Craft* which was affirmed by this Court in 1978.

REASONS FOR GRANTING THE WRIT

I.

THE RULE ANNOUNCED BY THE SIXTH CIRCUIT IS AN UNWARRANTED EXTENSION OF THE DECISION OF THIS COURT IN *MEMPHIS LIGHT, GAS & WATER DIVISION V. CRAFT* AND THIS COURT SHOULD CLARIFY ITS HOLDING IN *MEMPHIS LIGHT, GAS & WATER DIVISION V. CRAFT*, IN THAT IT HELD: (1) A CUSTOMER OF A MUNICIPALLY OWNED PUBLIC UTILITY HAS A PROPERTY RIGHT IN THE CONTINUATION OF SERVICE OF STOLEN ELECTRICITY; (2) A PRETERMINATION HEARING IS REQUIRED ONCE A PROPERTY RIGHT IN THE STOLEN ELECTRICITY HAS ATTACHED: AND (3) IT FAILED TO STATE WHAT PROCESS IS DUE, IF ANY, BEFORE THE REMOVAL OF ELECTRICITY MAY OCCUR.

The Sixth Circuit established new law when it held that a customer of a Tennessee municipally owned public utility company has a property right in electricity that is being stolen from the utility company. In arriving at its result, the Sixth Circuit misconstrued a Tennessee appellate court case and ignored certain Acts of the Tennessee Legislature which dealt specifically with the question. The Sixth Circuit cited *Trigg v. Middle Tennessee Electric Membership Corporation*, [hereinafter referred to as *Trigg*], 533 SW2d 730 (Tenn. App. 1975), for the proposition that in Tennessee a public utility is not permitted to terminate "at will" where a bona fide bill dispute exists[3]. In deference to the Sixth Circuit, *Trigg, supra*, holds that in the case of a disputed bill, an electric company may be liable in negligence for any damages for terminating service without cause. *Trigg, supra, does not* say, nor does *Craft*, that a utility company may not terminate service for cause. In that regard:

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[3] In *Craft*, *Trigg* was cited also, but by this Court for the proposition that in Tennessee, a utility company is permitted to terminate service at will "if there is cause." 436 U.S. at 9-11, 98 S.Ct. at 1560-1561, 56 L.Ed.2d at 39-40.

> . . . We do not hold that a public utility can never terminate service when the customer is absent. Nor do we hold that actual notice is *always* necessary. Here, however, it appears from the pleadings that the dispute had gone on for several months and defendant's action in terminating service without actual notice to the customer when no one was at home was unreasonable under the alleged circumstances in this case.
>
> *Trigg, supra*, at page 734

Further, *Trigg, supra*, announces the law in Tennessee with respect to a company's duties to its customers:

> A company supplying electricity to the public has the right to cut off service to a customer for nonpayment of a just service bill and the company may adopt a rule to that effect. Annot., 112 A.L.R. 237 (1938). An exception to the general rule exists when the customer has a bona fide dispute concerning the correctness of the bill. *Steele v. Clinton Electric Light & Power Co.*, 123 Conn. 180, 193 A. 613, 615 (1937); Annot., 112 A.L.R. 237, 241 (1938); see also 43 Am.Jur., Public Utilities and Services, Sec. 65; Annot., 28 A.L.R. 475 (1924). If the public utility discontinues service for nonpayment of a disputed amount it does so at its peril and if the public utility was wrong (e.g., customer overcharged), it is liable for damages. *Sims v. Alabama Water Co.*, 205 Ala. 378, 87 So. 688, 690, 28 A.L.R. 461 (1920). Ordinarily the question whether the dispute between the customer and the utility was bona fide is for the trier of fact. *Utilities Operating Co. v. Pringle*, 177 So.2d 684, 685 (Fla.App. 1965).
>
> *Trigg, supra*, at page 733

A. The rule announced by the Sixth Circuit directly conflicts with the provisions of Tennessee Code Annotated regarding the presumption and illegal diversion of electric power and the tampering with utility metering devices.

The Sixth Circuit then went on to compound its erroneous conclusion regarding the law in Tennessee by ignoring Sections 39-3-938 and 39-3-939 of Tennessee Code Annotated, which specifically deal with the diversion of electric power. [See Appendix E] Attention is specifically made to the fact that *Craft* was filed in the District Court in February, 1974, was decided by the Sixth

Circuit in April, 1976, and by this Court on May 1, 1978. The above cited Tennessee Code Sections were passed in 1978 and 1979, respectively.

It is clear from the legislative enactments that in Tennessee since 1978-1979, it is a crime for any person or *for any property, including the Myers' property*, to receive electric power which has been diverted, used with intent to defraud or to deprive the utility company from receiving proper charges or payment, to have present on the property an altered metering device, to have on the property any metering device which has been altered or injured, or any metering device which has been removed from one location and/or transferred to another location and/or to which it has not been assigned *and* installed by the utility company. Totally overlooked by the Sixth Circuit is the fact that §39-3-938 was enacted by the Tennessee Legislature by the Acts of 1978 (Adjourned Session), and §39-3-939 was enacted by the Tennessee Legislature by the Acts of 1979. Thus, the Tennessee Legislature has, subsequent to the holdings of both *Craft* and *Trigg*, passed substantive laws regarding stolen electrical service to both persons and property. The ruling of the Sixth Circuit that a person has a property right in stolen electricity is absolutely erroneous.

For the Sixth Circuit to say that Tennessee law provides that all customers have property rights in stolen electricity is totally contrary to both the Tennessee case law and the subsequently enacted statutes.

It has been stipulated, and therefore there is no dispute among the parties, that the metering device was removed from the Myers residence because it was stolen from another public utility, had been installed by someone other than City, and had been improperly installed in such a manner as to allow for and cause the theft of electricity from the City. As the District Court found below:

> . . . In this case it is undisputed that defendants were the victims of theft. It is also undisputed that plaintiff, regardless of her knowledge or participation or lack of knowledge or participation, benefited from this theft. As long as defendant's meter was absent from plaintiff's residence, defendants could not measure the power used by plaintiff. There seems to be no dispute that defendants had a right to stop the theft by

> removing the stolen KUB meter from plaintiff's residence. Defendants, of course, could not immediately restore plaintiff's power since the meter originally supplied to plaintiff had disappeared. Although defendants may have been able to restore plaintiff's electricity shortly after April 20, 1983, the Court believes defendants were entitled to determine the cause of the theft before they exposed themselves to additional loss; especially since plaintiff was unable to explain the theft. [Appendix C, page 12]

The only authority advanced by Myers in contending that she had a property right in the stolen electricity was the decision of this Court in *Craft*. This Court held in *Craft* that in the case of a disputed bill situation between a customer and a utility company, an informal pretermination hearing was required before the electricity could be terminated. This Court noted that Tennessee case law drew a line between utility bills that were the subject of a bona fide dispute and those that were not, and that a utility company may not deprive a customer of electrical service "except for good and sufficient cause," citing *Farmer v. Nashville*, 127 Tenn. 509, 515, 156 SW 189, 190 (1913). *Craft*, 436 U.S. at 11, 98 S.Ct. at 1561, 56 L.Ed.2d at 40. The basis of *Craft* was the likelihood of billing errors in consumer credit transactions and the statistical probabilities of error. *Craft*, 436 U.S. at 18, 20, 98 S.Ct. at 1565, 1566, 56 L.Ed.2d at 44, 45. This probability for erroneous deprivation is non-existent in this case, and, in fact, is not disputed by Myers; thus the reliance upon *Craft* and the underlying basis are an improper extension by the Sixth Circuit in this case involving stolen electricity instead of an unresolved billing dispute.

B. The rule announced by the Sixth Circuit is in conflict with numerous decisions of this Court regarding summary administrative action which effectively deprives a property right.

Having found a property right in connection with stolen electricity, the Sixth Circuit went on to hold that Myers was entitled to a pretermination hearing even though there existed a *prima facie* valid reason for the termination and even though there was and is no dispute by Myers as to the reason for termination. The Sixth Circuit, citing its case of *Lee v. Western Reserve Phychiatric (sic) Habilitation Center, et al, supra*, said:

> ... once a property interest is established, federal due process attaches to protect the interest from being extinguished without some type of pretermination hearing...
>
> 752 F.2d at 198-199

Then, relying upon *Mathews, supra*, it held Myers was entitled to a hearing. In doing so, the Court ignored or misapplied the three pronged test established regarding the requirements for pretermination hearings: (a) the private interest that will be affected by the official action; (b) the risk of erroneous deprivation; and (c) the government's interest.

The private interest to be affected was the electrical service to the Myers' house[4]. The Sixth Circuit concluded an erroneous deprivation on an incomplete record and ignored the stipulation entered into by the parties in the District Court[5].

The Sixth Circuit ignored the government's interest, which is set forth under the Tennessee statute law and the City's rules and regulations, and instead only commented to the economic burden upon the City for the same type of pretermination administrative hearing as mandated in *Craft*. In doing so, the Court

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[4]The City takes no issue with respect to the finding on this factor.

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[5]The Court concluded that since Elizabeth Myers was acquitted in the Tennessee Criminal Court that she was not guilty of the theft of electricity, but whether she was guilty or not guilty in a criminal court does not decide the issue of whether she knew of the theft of electricity, or whether she violated the schedule of rules and regulations of the City which provided for the discontinuance of service "for the theft of current or the appearance of current theft devices on the premises of Customers." Further, as pointed out by the City in its Petition to Rehear, a judgment of acquittal is hearsay and not admissible. *United States v. Viserto*, 596 F.2d 531 (2nd Cir. 1979) *cert. denied* 444 U.S. 841, 100 S.Ct. 80, 62 L.Ed.2d 52. The City has never conceded and did not concede in the Petition to Rehear, nor does it in this Court, that Elizabeth Myers did not have knowledge of the theft of electricity. The record on this evidentiary question is lacking, as it was never an issue with the District Court. See Questions Presented 3. to this Petition for Certiorari.

ignored the case authority from this court provided in the brief submitted by the City of the case authority from this Court regarding the numerous summary administrative actions that are proper by governmental entities without a pretermination due process hearing. Since 1856 and up to 1981, this Court has ruled on numerous occasions concerning the validity of summary administrative actions which do not require pretermination hearings. See: *Murray v. Hoboken Land & Improv. Co.* (1856) 59 U.S. 272, 15LEd. 372 [seizure of possession of money to pay debts for government revenues]; *Miller v. United States* (1871) 78 U.S. 268, 20 LEd. 135 [seizure of corporate stock in a corporation]; *McMillen v. Anderson* (1877) 95 U.S. 37, 24 LEd. 335 [tax collector's summary seizure of property for failure to pay license tax]; *Springer v. United States* (1881) 102 U.S. 586, 26 LEd. 253 [District Director, Internal Revenue Service, seizure and sale of property for failure to pay income tax assessment]; *Hagar v. Reclamation Dist. No. 108* (1884) 111 U.S. 701, 4 S.Ct. 663, 28 LEd. 569 [assessment for drainage canals as lien on land]; *Lawton v. Steele* (1894) 152 U.S. 133, 14 S.Ct. 499, 38 LEd. 385 [summary seizure/destroying of illegally used fishing nets]; *Buttfield v. Stranahan* (1904) 192 U.S. 470, 24 S.Ct. 349, 48 LEd. 525 [tea examiner's summary seizure for not being within minimum standards of wholesomeness]; *Scottish Union & Nat. Ins. Co. v. Bowland* (1905) 196 U.S. 611, 25 S.Ct. 345, 49 LEd. 619 [foreign insurance company distressed for taxes owed on personal property of insurance company]; *North American Cold Storage Co. v. Chicago* (1908) 211 U.S. 306, 29 S.Ct. 101, 53 LEd. 195 [confiscation of barrels of decaying poultry for public health reasons]; *Adams v. Milwaukee* (1913) 228 U.S. 572, 33 S.Ct. 610, 57 LEd. 971 [destroying of milk from untested cows]; *United States ex rel. Brown v. Lane* (1914) 232 U.S. 598, 34 S.Ct. 449, 58 LEd. 748 [removal of Osage Indian from tribal council]; *Central Union Trust Co. v. Garvan* (1921) 254 U.S. 554, 41 S.Ct. 214, 65 LEd. 403 [seizure of property "believed to be" enemy owned]; *Stoehr v. Wallace* (1921) 255 U.S. 239, 41 S.Ct. 293, 65 LEd. 604 [summary seizure and sequestration of property "believed to be" enemy owned]; *Phillips v. Commissioner* (1931) 283 U.S. 589, 51 S.Ct. 608, 75 LEd. 1289 [summary tax collection procedures]; *Fahey v. Mallonee* (1947) 332 U.S. 245, 67 S. Ct. 1552, 91 LEd. 2030 [Federal home loan

bank board - appointment of conservator]; *Ewing v. Mytinger & Casselberry, Inc.* (1950) 339 U.S. 594, 70 S.Ct. 870, 94 L.Ed. 1088, *reh den* 340 U.S. 857, 71 S.Ct. 69, 95 L.Ed. 627 [seizure of misbranded articles]; *Societe Internationale Pour Participations Industrielles et Commerciales, S. A. v. Rogers* (1958) 357 U.S. 197, 78 S.Ct. 1087, 2 L.Ed.2d 1255 [seizure of property "believed to be" enemy owned]; *Cafeteria & Restaurant Workers Union v. McElroy* (1961) 367 U.S. 886, 81 S.Ct. 1743, 6 L.Ed.2d 1230, *reh den* 368 U.S. 869, 82 S.Ct. 22, 7 L.Ed.2d 70 [summary decision of military base commander prohibiting civilians from coming onto base]; *Weinberger v. Hynson, Westcott & Dunning, Inc.* (1973) 412 U.S. 609, 93 S.Ct. 2469, 37 L.Ed.2d 207 [FDA withdrawal of drug approval without hearing]; *Calero-Toledo v. Pearson Yacht Leasing Co.* (1974) 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed. 2d 452, *reh den* 417 U.S. 977, 94 S.Ct. 3187, 41 L.Ed.2d 1148 [unlawful use of property (boat carrying drugs)]; *Goss v. Lopez* (1975) 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 [suspension of students from school for misconduct]; *Commissioner v. Shapiro* (1976) 424 U.S. 614, 96 S.Ct. 1062, 47 L.Ed.2d 278 [sufficient reason for summary taking in collection of revenues]; *Dixon v. Love* (1977) 431 U.S. 105, 97 S.Ct. 1723, 52 L.Ed.2d 172 [summary suspension of driver's license for history of offenses]; *Board of Curators of University of Missouri v. Horowitz* (1978) 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 [academic dismissal of medical student]; *Mackey v. Montrym* (1979) 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 [summary suspension of driver's license for refusal to take blood alcohol test on arrest]; *Barry v. Barchi* (1979) 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 [horse trainer's license suspended for suspicion of drugs in urine of horse]; *Parratt v. Taylor* (1981) 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 [loss of mail by prison authorities]; *Hodel v. Virginia Surface Mining & Reclamation Asso.* (1981) 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 [stopping of surface mining operation for public health and safety reasons].

See further summary of this Court's cases as contained in 69 L.Ed.2d 1044.

In this case, there was an undisputed crime being committed with regard to the theft of electricity and the victim was the City. The essence of the decision of the Sixth Circuit in this case is that the City is constitutionally required to give a due process preter-

mination hearing before it may stop the commission of a continuing crime. This proposition finds no support in *Craft, Mathews v. Eldridge, supra, Trigg,* or any other case relied on by the Sixth Circuit in its opinion. No authority is cited for the proposition that the Constitution of the United States requires that a victim give a due process pretermination hearing before it can stop a crime being committed against it.

C. The rule announced by the Sixth Circuit is of such general importance to the national law that this constitutional question should be settled by this Court.

As stated above, the effect of the ruling of the Sixth Circuit is that, notwithstanding the stipulated theft of electricity, a customer or a residence has a property right in that stolen electricity and that a pretermination hearing must be given before the crime may be stopped. This is now the law of the Sixth Circuit and is binding on all municipally owned public utilities in the States of Ohio, Michigan, Kentucky and Tennessee. But more than those four states are affected. Any state which has criminal statutes similar to Tennessee's diversion statutes [§ §39-3-938 and 39-3-939] will now find legal precedent that its criminal statutes dealing with the theft of electricity mean nothing when the municipally owned public utilities summarily attempt to cease the commission of the crime. Research has revealed that thirty-eight states, along the District of Columbia, Puerto Rico and the Virgin Islands, have statutes similar to Tennessee dealing with the diversion or theft of electricity. [See Appendix G for list of states and statutory citations.]

Clearly the rule advanced by the Sixth Circuit in this case is of such general importance to the national law that this constitutional question concerning whether pretermination hearings are required in situations involving the theft of electricity from a municipally owned public utility should be settled by this Honorable Court.

II

THE SIXTH CIRCUIT'S ORDER WHICH REVERSED A MOTION FOR SUMMARY JUDGMENT AND ENTERED JUDGMENT OF LIABILITY IN FAVOR OF NONMOVING PARTIES RATHER THAN REMANDING TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING ON THE AMOUNT OF PROCESS DUE A CUSTOMER OF A MUNICIPALLY OWNED PUBLIC

UTILITY, WAS CONTRARY TO PRIOR DECISIONS OF THIS COURT AND CONSTITUTED A DEPARTURE FROM SETTLED APPELLATE PRACTICES IN CONFLICT WITH OTHER UNITED STATES COURTS OF APPEAL.

Myers appealed to the Sixth Circuit from the granting of a Motion for Summary Judgment in favor of the City by the District Court. The Motion for Summary Judgment in the District Court was supported by Affidavits, Answers to Requests for Admission and a Stipulation of the parties. The Motion was not granted after an evidentiary hearing or a trial. In its reversal, the Sixth Circuit merely announced that Myers' rights had been violated, citing *Craft*, and:

> Thus the case should be reversed and remanded with instructions to the district court to enter an order accordingly and to determine the damages, if any, to which plaintiff may be entitled.
>
> 752 F.2d at 200

It is settled constitutional law that the initial determination of what process is due under the Fourteenth Amendment is initially to be determined by the trier of fact based upon the circumstances and situation involved in the deprivation of a private right. See *Craft, supra*, 436 U.S. at 13, 98 S.Ct. at 1562, 56 L.Ed2d at 41. *Mathews v. Eldridge, supra*, 424 U.S. at 334-335. In this regard, it is significant to note that Judge Wellford, in his concurrence on the Petition to Rehear filed by the City in this cause, stated:

> I am persuaded by the petition, however, that the most proper course would be to remand the case for disposition on all issues, including liability as well as damages. The district court is the best body to make the initial determination about how much process is due and whether that standard was violated based on the unusual facts in this case. The amount of due process required in the ordinary utility bill dispute situation of *Craft* may or may not be required here because, as the Supreme Court stated in *Craft* and elsewhere, "due process is flexible and calls for such procedural protections as the particular situation demands." 436 U.S. at 15

This Court's decisions regarding the flexibility of due process and the procedural protections demanded by particular situations are *Mathews v. Eldridge, supra*, and *Morrissey v.*

Brewer, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972).

Also the Sixth Circuit, by its ruling, has denied the City an opportunity to offer proof on the liability question at trial. This step taken by the Sixth Circuit is not a standard practice of the appellate review and is in conflict with other circuits.

On review of the Motions for Summary Judgment, an Appellate Court may not second guess a Trial Court's determination that questions of fact remain to be resolved and that further procedures were required. *McSurley v. McClellan*, 172 U.S.App.D.C. 364, 521 F.2d 1024 (1975).

Further an Appellate Court is not permitted to weigh the evidence, pass on the credibility of witnesses or speculate as to the ultimate findings of fact. *Pepper & Tanner, Inc., v. Shamrock Broadcasting, Inc.*, 563 F.2d 391 (9th Cir. 1977).

The function of the Court of Appeals from summary judgment is not to resolve factual issues. *Mallard v. Aluminum Co. of Canada, Ltd.*, 634 F.2d 236 (5th Cir. 1981) *cert. denied, Erikson v. Mallard*, 454 U.S. 816, 102 S.Ct. 93, 70 L.Ed.2d 85.

Only where a full record is before the Court of Appeals, devoid of issues of disputed material fact, can this Court rule on the merits rather than remanding to the District Court. *Independent Bankers Ass'n of America v. Heimann*, 198 U.S.App.D.C. 431, 613 F.2d 1164 (1979), *cert. denied*, 449 U.S. 823, 101 S.Ct. 89, 66 L.Ed.2d 26.

Only when all issues were before the District Court and decided by it may an Appellate Court enter a judgment in the District Court. *First National Bank in Yonkers v. Maryland Cas Co.*, 290 F.2d 246 (2nd Cir. 1961), *cert. denied*, 368 U.S. 939, 82 S.Ct. 381, 7 L.Ed.2d 338.

The District Court, in this case, ruled only that Myers had no property right to stolen electricity. It never passed upon what process, if any, was due Myers before the termination of the stolen electricity. The question of what process was due was decided by the Sixth Circuit with no evidence concerning what procedure was reasonable under the circumstances.

This Court in the case of *Fountain v. Filson*, 336 U.S. 681, 59 S.Ct. 754, 93 L.Ed. 972 (1949) held that a remand to the District Court for trial is required where the Court of Appeals

concludes that a claim should have been considered by the District Court.

The Court of Appeals, in entering a judgment of liability and remanding for damages only, has ruled in contravention with a decision of this Court and conflicting decisions of other Courts of Appeal.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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City of Alcoa and David
Switzer, manager of Blount
Electric System and employee
of the City of Alcoa

Dated: May 30, 1985

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 84-5049

Elizabeth Myers, et al.,
Plaintiffs-Appellants,

v.

City of Alcoa, et al.,
Defendants-Appellees.

On appeal from the United States District Court for the Eastern District of Tennessee.

Decided and Filed January 9, 1985

Before: Krupansky and Wellford, Circuit Judges; and Peck, Senior Circuit Judge.

Krupansky, Circuit Judge. Elizabeth Myers (Myers) appealed the summary dismissal of her § 1983 cause of action predicated upon the discontinuance of her electric utility service by the City of Alcoa and David Switzer, the manager of Blount Electric System and a city employee (hereinafter "defendants"). The following facts were stipulated by the parties in the proceedings below.

On April 5, 1983, defendants installed an electrical metering device at Myers' residence and began providing utility services. The meter was read by an employee of the defendant on April 15, 1983. Meyers paid the $13 bill which resulted from that reading.

On April 20, 1983, a city employee came to Myers' home and discovered that the city's meter had been removed and a Knoxville Utilities Board (KUB) meter placed in its stead. Myers denied any knowledge or participation in the removal of the

original meter and unlawful replacement with a stolen KUB metering device. The city disconnected Myer's utility service on April 20, 1983, without notice or a hearing. Electric service was resumed to the Myers' residence on August 19, 1983, one day after Myers was found not guilty of electricity theft in a criminal trial.

On July 12, 1983, Myers, on behalf of herself and her three minor children, filed a complaint in federal district court seeking injunctive and declaratory relief against the defendants whom she alleged had violated her fourteenth amendment due process rights by terminating her electric service without notice.[1]

On December 16, 1983, the trial court granted defendants' motion for summary judgment. The essence of the court's decision was that plaintiff had no property interest in receiving electricity, because the theft constituted cause to terminate service. Thus, the Court dismissed plaintiff's §1983 complaint for failure to identify a property interest deserving of fourteenth amendment due process protection.

Plaintiff filed a timely appeal.

The district court's dismissal of the instant case was predicated on its interpretation and application of *Memphis Light, Gas & Water Division v. Craft*, 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978). In *Craft*, plaintiff brought an action challenging the constitutionality of a municipal utility's policies permitting termination of electric, gas and water services without notice and/or a predetermination hearing. To ascertain whether fourteenth amendment procedural protections attached to the termination of electricity by the city, the Supreme Court turned to Tennessee law for a definition of the "property" right allegedly involved. Citing *Trigg v. Middle Tennessee Electric Membership Corp.*, 533 S.W.2d 730 (Tenn. App. 1975), *cert. denied*, (Tenn. S.Ct. March 15, 1976), the Court concluded:

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[1] Although electric service had been reinstated to the Myers' household, the request for injunctive relief is not moot because the relief sought includes a prayer that defendants be enjoined from terminating plaintiff's services in the future without a pretermination hearing. (In addition, plaintiff seeks "such damages as proof shall determine" and attorney's fees and costs.)

> The outcome of that inquiry [i.e. whether Tennessee recognizes the reception of electricity as a property right] is clear in this case. In defining a public utility's privilege to terminate for nonpayment of proper charges, Tennessee decisional law draws a line between utility bills that are the subject of a bona fide dispute and those that are not.
> 436 U.S. at 9.

Since Tennessee did not permit a public utility to terminate service "at will" where a bona fide dispute existed, and further provided for an aggrieved customer to (1) enjoin a wrongful threat to terminate or (2) bring a subsequent action for damages or a refund, the Supreme Court in *Craft* held that these protections support a finding of a state-recognized property interest in receiving electricity which constitutes "a 'legitimate claim of entitlement' within the protection of the Due Process Clause." 436 U.S. at 11-12.

In further support of its holding that Tennessee recognizes a property right in the receipt of electricity,the Supreme Court analogized the situation in *Craft* to cases such as *Arnett v. Kennedy*, 416 U.S. 134, 94 S.Ct. 1633, 39 L.Ed.2d 15 (1974) and *Bishop v. Wood*, 426 U.S. 341, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976), in which it was held that where a city or federal employee could only be removed "for cause," as opposed to serving merely at the "will" of his superiors, a constitutionally recognized property interest exists which results in such employment being accorded fourteenth amendment due process protection. 436 U.S. at 11, n.11.

In the instant case, the court below viewed *Craft's* interpretation of *Trigg* as delineating two distinct situations. The first is where a customer fails to pay an electric bill and the amount due for service is undisputed. In that circumstance, the utility company is permitted to terminate service without notice since no property interests attaches which would invoke fourteenth amendment safeguards. In the second situation, where a dispute of the amount due from the customer is in issue, a significant property interest exists which prohibits the utility company from terminating service without prior notice to the customer. Thus, some type of pre-termination hearing as to the dispute is mandated.

Since there is no precedent addressing the issue of a theft of electricity and its impact on terminating service with or without a pretermination hearing, the district court concluded that pirated electricity, albeit by an undetermined person, brings this case within the analogy of an *undisputed* nonpayment, which under Tennessee law, permits a utility company to terminate service without infringing on a protected property right of the recipient. The court reasoned:

> Plaintiff would have been entitled to procedural due pro cess if she had a property interest in receiving electricity. 436 U.S. 1. In Tennessee a customer has a property interest in receiving electricity unless undisputed cause exists for termination. *See Trigg v. Middle Tennessee Electricity Membership Corp.*, 533 S.W.2d 730 (Tenn. App. 1975), *cert. denied*, (Tenn. 1976). Although there may be a dispute as to who was stealing electricity, it is undisputed that electricity was being stolen at plaintiff's residence. This is sufficient cause to terminate electrical service. A person has no due process right to stolen property even where the person has no knowledge that the property was stolen. *See Parkam v. Riley*, 44 Tenn. (4 Cold.) 5 (1867).

The district court's pronouncement appears flawed in at least two respects. First, as recognized in *Craft*, public utilities in Tennessee are obligated to provide service to "all the inhabitants of the city of its location alike, without discriminating, [and] *without denial, except for good and sufficient cause,*" 436 U.S. at 11. Therefore, like the employees in *Arnett* and *Bishop* both, *supra*, who had an expectation of continued employment (and thus a property right) because they could not be terminated except "for cause," a recipient of electrical service in Tennessee has a property right in the continuation of electric service because it cannot be terminated except "for good and sufficient cause." Once it is determined that such a property right exists, the procedural due process protections which attach to it cannot be discarded simply because the utility unilaterally determined that it has sufficient cause to terminate. Stated differently, the "property right" which invokes due process considerations does not cease to exist simply because the utility's claim appears to be *prima facie* valid. Rather, as recently observed by this circuit in *Lee v. Western Reserve*

Phychiatric Habilitation Center, et al., No. 83-3421 (6th Cir. November 6, 1984), once a property interest is established, federal due process attaches to protect the interest from being extinguished without some type of pretermination hearing. Slip op. at 7-9. This conclusion is supported by the language in *Craft* which reaffirms the standard set forth in *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976) for determining the specific dictates of due process in a given case. 436 U.S. at 17-18.

In *Mathews*, the Supreme Court pronounced that the "process due" in a given case requires consideration of three distinct factors: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures currently used, and the probable value, if any, of additional or substitute safeguards; and (3) the government's interest, including the administrative and fiscal burdens that additional safeguards would entail. *Mathews*, 424 U.S. at 3334-335; 96 S.Ct. at 903.

In the instant case, it is clear that the "private interest," i.e., the right to continue receiving electricity, is of the highest order. Tennessee recognizes this fact by including electricity in the list of services which it deems as "essential" in its landlord-tenant legislation. *See e.g.*, T.C.A. §66-28-503(a)(3) (landlord is subject to civil penalties for failing to provide "essential services" which include gas, heat, and electricity.) As the *Trigg* court opined:

> Moreover, we recognize that electric cooperatives in the state of Tennessee enjoy a monopolistic position that spawns certain rights and benefits. A concomitant of these rights and benefits is a duty to use a corresponding degree of care to protect the public. We hold that in Tennessee a public utility, when terminating service to a customer, must act reasonably when the discontinuance of the service might present an obvious danger of damage to the property of the customer. *See Washington Gas Light v. Aetna Casualty & Sur. Co.*, 250 Md. 325, 242 A.2d 802 (1968).
> 533 S.W.2d at 734.

And finally, the Supreme Court in *Craft* took judicial notice that "[t]he customer's interest is self-evident," as "[u]tility service is a necessity of modern life," the discontinuance of which "for even short periods of time may threaten health and safety." 436 U.S. at 18, 98 S.Ct. at 1565.

The result of the application of the second prong of the *Mathews*, test, i.e. the "risk of erroneous deprivation," is also self-evident in this case. As was determined at the criminal trial of Myers four months after her electric service was disconnected, she was not guilty of the theft of electricity. Furthermore, she had continually claimed lack of knowledge and participation in the removal and replacement of the meter assigned her. In addition, there is nothing in the record from which it can be inferred that Myers refused to pay the reasonable value of an estimated amount of electricity consumed at her residence during the period in question. And finally, it should be noted that the Tennessee Code permits the utility to pursue civil remedies, including trebel damages, for electricity which has been pirated. *See* T.C.A. §39-3-938 and §39-3-939. Thus, the "risk of erroneous deprivation" under the current system is great as to the customer, while virtually a nullity as far as the defendant supplier is concerned.

And finally, *Mathews* requires this court to consider the fiscal and administrative burden on the utility company in providing pre-termination hearings. As *Craft* clearly mandated that a customer who disputes a bill be given the opportunity to meet "with a responsible employee empowered to resolve the dispute . . . well in advance of the scheduled date of termination," 436 U.S. at 18, the same mechanism could be employed, at no additional burden on the defendant, in situations like the one at bar where the customer disputes his or her culpability in the theft of defendant's electricity.

Defendant cites the case of *Jackson v. Davis*, 530 F.Supp. 2 (E.D. Tenn.), *aff'd without opinion*, 667 F.2d 1026 (6th Cir. 1981) for the proposition that there was no need for a hearing in this case because there was "cause" to terminate service. This is an incorrect characterization of *Jackson*. In that case, the landlord was notified by the city that his building was unsafe because of a defective or dangerous electric wiring system. Unlike the instant case, the landlord in *Jackson* had the opportunity to correct the system or request an appeal and hearing. Despite notice, the landlord failed to avail himself of these remedies, and the city ordered the Power Board to disconnect service 11 days after notice. Clearly, the resumption of continued services in *Jackson* would have been a safety and health hazard because of the defective electric wiring system. Moreover, the customer did not dis-

pute the cause for termination and did not avail himself of the due process protections. *Jackson* at 8. In contrast, plaintiff herein disputed the cause for termination, the defendant would not have created a hazard or violated the law by resuming service if it had provided another meter, and no due proces sprotections were afforded plaintiff.

Finally, defendant, utilizing telephone service cases, argues that it had a duty to prevent violations of the law by removing the meter from plaintiff's residence.[2] The analogy is poorly taken because termination of telephone service does not usually create the same health hazard as termination of water or electricity. In addition, plaintiff informed the defendant of her intent to continue to pay for the service. Thus, it was not a situation, as in telephone company cases, involving a *continued* illegality.

In sum then, the district court erred in failing to recognize the important property right at issue herein which entitled plaintiff to notice and a pretermination hearing prior to termination of electric service.

The final error in the district court's decision is its analogy of the instant case to a situation where property is stolen and the thief, or even a bona fide purchaser, seeks to retain the property. The Court below concluded:

> A person has no due process right to stolen property even where the person has no knowledge that the property was stolen. *See Park v. Riley*, 44 Tenn. (4 Cold.) 5 (1867).

In this respect, it appears that the district court failed to recognize that plaintiff's property interest at stake was the right to receive continued electrical service, for which she was willing to pay, and not the right to any tangible property (such as the meter itself) which would make the Tennessee decision of *Parkam* relevant. Since Myers was not attempting to retain stolen property, *Parkam* is inapposite to the instant case.

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[2] These cases include *Palma v. Powers*, 295 F.Supp. 924, 939 (N.D. Ill. 1962) and *Telephone News Systems, Inc. v. Illinois Bell Telephone Co.*, 220 F.Supp. 621, 623, *aff'd*, 376 U.S. 782 (1963).

Based upon Tennessee law as announced in *Trigg* and interpreted by the Supreme Court in *Craft*, it is clear that a property right exists in the continued receipt of electricity. Thus, plaintiff's rights were violated when her service was terminated without any procedural safeguards to protect her right. *Craft* instructs that at a minimum, plaintiff should have been afforded notice of the proposed termination and the opportunity to discuss the theft with the utility in an effort to resolve the problem before the scheduled termination. Thus, the case should be reversed and remanded with instructions to the district court to enter an order accordingly and to determine the damages if any, to which plaintiff may be entitled.

Costs are awarded to plaintiffs pursuant to Fed.R.App.P.38.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 84-5049

Elizabeth Myers, et al.,
Plaintiffs-Appellants,

v.

City of Alcoa, et al.,
Defendants-Appellees.

FILED
Mar. 6, 1985
JOHN P. HEHMAN, Clerk

ORDER

Before: Krupansky, Wellford, Circuit Judges and Peck, Senior Circuit Judge.

This cause comes before the court upon the petition of the defendants-appellees for reconsideration of the panel's opinion of January 9, 1985.

Upon consideration of the petition, the court finds it to not be well taken; it is

Therefore ORDERED that the petition for rehearing be, and it hereby is, denied.

Wellford, Circuit Judge, concurring. I continue to adhere to the original opinion in this case that the district court erred in granting defendant-appellees' motion for summary judgment. As stated in Judge Krupansky's opinion, it is clear that *Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978), establishes a public utility's property interest in continued service. Thus the district court erred in granting summary judgment on the grounds that the utility consumer in the instant case had no property interest that deserved due process protection.

I am persuaded by the petition, however, that the most proper course would be to remand the case for disposition on all issues, including liability as well as damages. The district court is the best body to make the initial determination about how much process is due and whether that standard was violated based on the unusual facts in this case. The amount of due process required in the ordinary utility bill dispute situation of *Craft* may or may not be required here because, as the Supreme Court stated in *Craft* and elsewhere, "due process is flexible and calls for such procedural protections as the particular situation demands." 436 U.S. at 15 n.5.

ENTERED BY ORDER OF THE COURT
John P. Hehman, Clerk

By: Leonard Green
Chief Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

Elizabeth Myers, et al.,
v.
City of Alcoa, et al.

CIV. 3-83-435

MEMORANDUM

Plaintiff filed this 42 U.S.C. §1983 action alleging that defendants discontinued her electricity without providing her with a pre-termination hearing. Jurisdiction is not contested and the relevant facts have been stipulated. This case is before the Court on defendants' motion for summary judgment.

On April 5, 1983, defendants installed an electrical metering device at plaintiff's residence and began providing plaintiff with electricity. On April 20, 1983, defendants discovered that their meter had been replaced with a meter that had been stolen from the KnoxvilleUtilities Board [KUB]. Also, the meter pan on which the meter was installed had been tampered with so that the meter could be removed and installed without breaking the seal on the meter pan. Defendants have never recovered the meter they originally installed on plaintiff's residence. Defendants removed the KUB meter but did not replace it with a new meter. This resulted in plaintiff's electricity being discontinued as of April 20, 1983. Plaintiff was not provided with a pre-termination hearing. The only source of electricity at plaintiff's residence was from defendants. Plaintiff denies any knowledge of electricity theft and on August 18, 1983, she was found not guilty of criminal charges relating to electricity theft. On August 19, 1983, defendants resumed service at plaintiff's residence.

Plaintiff claims the right to electrical service is a property right which can not be taken away without due process. *See Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978). Craft and most of the cases cited therein, however, involved the termination of utilities for alleged nonpayment of utility bills. In this case it is undisputed that defendants were the victims of theft. It is also undisputed that plaintiff, regardless of her knowledge or participation or lack of knowledge or participation, benefited from this theft. As long as defendant's meter was absent from plaintiff's residence, defendants could not measure the power used by plaintiff. There seems to be no dispute that defendants had a right to stop the theft by removing the stolen KUB meter from plaintiff's residence. Defendants, of course, could not immediately restore plaintiff's power since the meter originally supplied to plaintiff had disappeared. Although defendants may have been able to restore plaintiff's electricity shortly after April 20, 1983, the Court believes defendants were entitled to determine the cause of the theft before they exposed themselves to additional loss; especially since plaintiff was unable to explain the theft.

Plaintiff would have been entitled to procedural due process if she had a property interest in receiving electricity. 436 U.S. 1. In Tennessee a customer has a property interest in receiving electricity unless undisputed cause exists for termination. *See Trigg v. Middle Tennessee Electricity Membership Corp.*, 533 S.W.2d 730 (Tenn. App. 1975), *cert. denied* (Tenn. 1976). Although there may be a dispute as to who was stealing electricity, it is undisputed that electricity was being stolen at plaintiff's residence. This is sufficient cause to terminate electrical service. A person has no due process right to stolen property even where the person has no knowledge that the property was stolen. *See Parkam v. Riley*, 44 Tenn. (4 Cold.) 5 (1867).

It is therefore ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted.

Order Accordingly.

Robert L. Taylor
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
TENNESSEE NORTHERN DIVISION

Elizabeth Myers, et al.,
v.
City of Alcoa, et al.,

CIV. 3-83-435

ORDER

For the reasons stated in a memorandum opinion this day passed to the Clerk for filing, it is ORDERED that defendants' motion for summary judgment be, and the same hereby is, granted.

ENTER:

Robert L. Taylor
United States District Judge

APPENDIX E

39-3-938. Diversion of electrical power — Presumption of intent to defraud — Civil action by utility. — (a) It shall be unlawful for any person to divert or use electrical power with the intent to defraud or deprive any public or private electric power supplier from receiving proper charges or payment for such electrical power.

(b)(1) The receipt of benefits of electrical power by a utility customer without incurring proper charges therefor shall be presumptive evidence of an intent to defraud or deprive an electric power supplier from receiving proper charges or payment for such electrical power.

(2) For purposes of this section, a utility customer shall mean:

(A) The person or persons listed on the records of the electric power supplier as the customer liable for the charges or payment for the electrical power received without proper charge; or

(B) The manager, superintendent, officer, or other responsible official of a corporation, partnership, proprietorship, association or other business organization that has received electrical power without proper charge.

(3) The presence upon property served by an electric power supplier of a metering device altered to improperly monitor the amount of electrical power used on or by such property shall be presumptive evidence that the utility customer, as herein defined, has diverted or used electrical power with the intent to deprive or defraud an electric power supplier from receiving proper charges or payment for such electrical power.

(c) Any person found in violation of this section shall be subject to a fine of not less than one hundred dollars ($100) nor more than five thousand dollars ($5,000) or imprisonment for a period of not more than eleven (11) months and twenty-nine (29) days or both.

39-3-939. Tampering with utility metering devices — Presumption of intent — Civil action by utility. — (a) DEFINI-

TIONS. . . . (3) "Tenant or occupant" shall include any person who occupies the whole or a part of any building, whether alone or with others and shall include the owner.

(4) "Utility" means any public or private utility authorized to provide electricity, natural gas or water or any combination thereof for sale to consumers in any particular service area.

(b) MISDEMEANOR — PROHIBITED ACTS. It shall be a misdemeanor for any person as the tenant or occupant to commit or authorize any of the following acts. It shall further be a misdemeanor for any person to commit any of the following acts which would make gas, electricity or water available to tenant or occupant by committing any of the following acts. All persons aiding and abetting in such prohibited acts shall be deemed a principal and punishable as such.

(1) To connect any tube, pipe, wire or other instrument with any meter, device or other instrument used for conducting gas, electricity or water in such a manner as to permit the use of said gas, electricity or water without same passing through a meter or other instrument recording the usage for billing.

(2) To alter, injure or prevent the action of a meter, valve, stopcock or other instrument used for measuring quantities of gas, electricity or water.

* * * *

(4) To remove a metering device for measuring quantities of gas, electricity or water.

(5) To transfer from one location to another a metering device for measuring utilities of gas, electricity or water.

(6) To use a metering device belonging to the utility that has not been assigned to said location and installed by the utility.

* * * *

(c) EVIDENCE OF VIOLATION. Any property on which it is found to have electric gas or water utilities tampered with in violation of this section and capable of receiving gas, electricity or water as a result of the use of any method of diversion prohibited herein shall be prima facie evidence and create against the tenant or occupant a presumption of intent to tamper or divert in violation of the provisions of this section.

APPENDIX F

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

No. 3-38-435

Elizabeth Myers, et al.,
Plaintiffs

v. No. 3-83-435

City of Alcoa, et al.,
Defendants

STIPULATION

It is hereby stipulated by and between the Plaintiffs and Defendants, for the purpose of this lawsuit only, as follows:

1. The Board of Public Utilities of the CITY OF ALCOA installed an electrical metering device at the residence of the Plaintiffs on April 5, 1983.

2. The Board of Public Utilities of the CITY OF ALCOA provided electrical services and power to the Plaintiffs' residence from April 5, 1983 through April 20, 1983.

3. On April 20, 1983, the Board of Public Utilities of the CITY OF ALCOA found that the meter installed by the Board of Public Utilities of the City of Alcoa on April 5, 1983 had been replaced with a Knoxville Utilities Board electrical metering device at the residence of the Plaintiffs, which metering device had been stolen from the Knoxivlle Utilities Board.

4. The electrical metering device installed by the Board of Public Utilities of the CITY OF ALCOA on April 5, 1983 has never been returned to the Board of Public Utilities of the CITY OF ALCOA.

5. On April 20, 1983, an employee of the Board of Public Utilities of the CITY OF ALCOA came to the residence of the Plaintiff, ELIZABETH MYERS, and discovered a meter which did

not belong to the Board of Public Utilities of the CITY OF ALCOA. He also discovered that the meter pan on which the meter is installed had been tampered with so that the meter could be removed and installed without breaking the seal on the meter pan.

6. The employees of the Board of Public Utilities of the CITY OF ALCOA removed the unauthorized meter from the home of the Plaintiff, ELIZABETH MYERS, on April 20, 1983.

7. Attached hereto are copies of the Schedule of Rules and Regulations, Procedure for Termination of Electric Service on Delinquent Accounts, Resolution adopted by the Board of Public Utlities of the CITY OF ALCOA and Management Directive No. 1 of the Board of Public Utilities of the CITY OF ALCOA which were in effect on April 20, 1983.

8. Plaintiffs were without electrical power from the Defendant Board of Public Utilities of the CITY OF ALCOA from April 20, 1983 until August 19, 1983.

9. Defendant CITY OF ALCOA'S Board of Public Utilities gave no notice of an opportunity for a hearing to MS. MYERS prior to the termination of utility services.

10. Defendant CITY OF ALCOA'S Board of Public Utilities's policies did not provide for an opportunity for a hearing prior to termination of utilities when it concludes a theft of power device is being used by the occupant. Section 10 of Defendant's Rules and Regulations, as attached.

11. MS. MYERS'S only source of electricity at the residence in question was from Defendant CITY OF ALCOA'S Board of Public Utilities.

12. That if Larry Frye were called as a witness to testify in this cause, he would testify as stated in the affidavit of Larry Frye sworn to on the 13th day of September, 1983, which affidavit was filed with the Motion for Summary Judgment filed in this cause by the Board of Public Utilities of the CITY OF ALCOA, a copy of which affidavit is attached hereto.

/s/ Gary D. Housepian
Attorney for Plaintiffs

/s/ M. H. Gamble, Jr.
Attorney for Defendants

BLOUNT ELECTRIC SYSTEM
PROCEDURE FOR TERMINATION OF ELECTRIC SERVICE ON DELINQUENT ACCOUNTS

Adopted *April 29, 1980*
Effective Date *May 1, 1980*

1. In accordance with Blount Electric System's billing procedure, electric service accounts are due and payable upon billing date and without penalty for a period of not less than fifteen (15) days thereafter.

2. Delinquent accounts (bills not paid by the latest due date) will be subject to termination not sooner than ten (10) days following the latest due date.

3. A written notice of termination ("cut-off notice") shall be mailed to customer at least five (5) days prior to the scheduled date of termination. The cut-off notice will include:

   a) The amount due, including any other charges
   b) The last date of payment to avoid termination
   c) Instructions as to how to apply for a hearing if the amount of the bill is disputed.

4. If customer does not make payment or notify Distributor of dispute of bill, prior to the cut-off date, Distributor will proceed on schedule with termination.

5. Delinquent accounts will be effectively terminated at 9:30 a.m. on the cut-off date, at which time a list of terminated accounts will go from the billing office to the field for cut-off. All accounts paid after 9:30 a.m. on the cut-off date, whether or not disconnection of service has been completed, will be subject to a "service reinstatement fee".

6. The employee carrying out the termination procedure will attempt before disconnecting service to contact the customer at the premises in a final effort to collect payment and avoid termination. The service reinstatement fee will be added to the bill in accordance with Paragraph 5 above.

7. If the bill including the reinstatement fee is not paid in full to the employee at the premises, or if no one is at the premises, the employee will proceed with the termination of service.

8. After completion of the termination procedure, the customer may reinstate his service by paying the total amount due, including the reinstatement fee. If the customer requires the

reconnection to be made at a time other than Distributor's regular working hours, an "after-hours" reconnection fee will be charged in addition to the reinstatement fee.

9. The amount of the "service reinstatement fee" and the "after-hours" reconnection fee will be determined by the Alcoa Board of Public Utilities and may be revised from time to time by the Board to reflect current administrative and operational costs.

Effective May 1, 1980, the service reinstatement fee for all classes of service shall be $9.00. The after-hours reconnection fee shall remain at the present established fee of $25.00

10. In the event of a dispute in the amount of a bill, a hearing may be requested and will be held by appointment at Blount Electric System office between the hours of 8:00 a.m. and 4:30 p.m. on any business day. Hearings will be conducted by a duly appointed Hearing Officer. In the event of a dispute in the amount of a bill, the customer's service wil not be terminated until an appropriate decision is reached.

11. A copy of this termination procedure will be provided upon request at the Blount Electric System office at 264 N. Rankin Road, Alcoa.

SCHEDULE OF RULES AND REGULATIONS

1. *Application for Service.* Each prospective Customer desiring electric service may be required to sign Distributor's standard form of application for service or contract before service is supplied by the Distributor.

2. *Deposit.* A deposit or suitable guarantee approximately equal to twice the average monthly bill may be required of any Customer before electric service is supplied. Distributor may at its option return deposit to Customer after one year. Upon termination of service, deposit may be applied by Distributor against unpaid bills of Customer, and if any balance remains after such application is made, said balance shall be refunded to Customer.

3. *Point of Delivery.* The point of delivery is the point, as designated by Distributor, on Customer's premises where current is to be delivered to building or premises. All wiring and equipment beyond this point of delivery shall be provided and maintained by Customer at no expense to Distributor.

4. *Customer's Wiring--Standards.* All wiring of Customer must conform to Distributor's requirements and accepted modern standards, as exemplified by the requirements of the National Electrical Safety Code and the National Electrical Code.

5. *Inspections.* Distributor shall have the right, but shall not be obligated, to inspect any installation before electricity is introduced or at any later time, and reserves the right to reject any wiring or appliances not in accordance with Distributor's standards; but such inspection or failure to inspect or reject shall not render Distributor liable or responsible for any loss or damage resulting from defects in the installation, wiring, or appliances, or from violation of Distributor's rules, or from accidents which may occur upon Customer's premises.

6. *Underground Service Lines.* Customers desiring underground service lines from Distributor's overhead system must bear the excess cost incident thereto. Specifications and terms for such construction will be furnished by Distributor on request.

7. *Customer's Responsibility for Distributor's Property.* All meters, service connections, and other equipment furnished by Distributor shall be, and remain, the property of Distributor. Customer shall provide a space for and exercise proper care to protect the property of Distributor on its premises, and, in the event of loss or damage to Distributor's property arising from neglect of Customer to care for same, the cost of the necessary repairs or replacements shall be paid by Customer.

8. *Right of Access.* Distributor's identified employees shall have access to Customer's premises at all reasonable times for the purpose of reading meters, testing, repairing, removing, or exchanging any or all equipment belonging to Distributor.

9. *Billing.* Bills will be rendered monthly and shall be paid within fifteen (15) days from date of bill at the office of Distributor. Failure to receive bill will not release Customer from payment obligation. Should bills not be paid as above, Distributor may at any time thereafter, upon five (5) days' written notice to Customer, discontinue service. Bills paid on or before the final date of payment shall be payable at the net rates, but thereafter the gross rates shall apply, as provided in the Schedule of Rates and Charges. Should the final date for payment of the bill at the net rates fall on a Sunday or holiday, the business day next following

the final date will be held as a day of grace for delivery of payment. Net rate remittances received by mail after the time limit for payment of said net rates will be accepted by Distributor if the incoming envelope bears United States Post Office date stamp of the final date for payment of the net amount or any date prior thereto.

10. *Discontinuance of Service by Distributor.* Distributor may refuse to connect or may discontinue service for the violation of any of its Rules and Regulations, or for violation of any of the provisions of the Schedule of Rates and Charges, or of the application of Customer or contract with Customer. Distributor may discontinue service to Customer for the theft of current or the appearance of current theft devices on the premises of Customer. The discontinuance of service by Distributor for any causes as stated in this rule does not release Customer from his obligation to Distributor for the payment of minimum bills as specified in application of Customer or contract with Customer.

11. *Reconnection Charge.* Whenever service has been discontinued by Distributor, as provided above, or a trip is made for the purpose of discontinuing service, a charge of not less than One Dollar ($1.00) may be collected by Distributor before service is restored.

12. *Termination of Contract by Customer.* Customers who have fulfilled their contract terms and wish to discontinue service must give at least three (3) days' written notice to that effect, unless contract specifies otherwise. Notice to discontinue service prior to expiration of contract term will not relieve Customer from any minimum or guaranteed payment under any contract or rate.

13. *Service Charges for Temporary Service.* Customers requiring electric service on a temporary basis may be required by Distributor to pay all costs for connection and disconnection incidental to the supplying and removing of service. This rule applies to circuses, carnivals, fairs, temporary construction, and the like.

14. *Interruption of Service.* Distributor will use reasonable diligence in supplying current, but shall not be liable for breach of contract in the event of, or for loss, injury, or damage to persons or property resulting from, interruptions in service, excessive or inadequate voltage, single-phasing, or otherwise unsatisfactory service, whether or not caused by negligence.

15. *Shortage of Electricity.* In the event of an emergency or other condition causing a shortage in the amount of electricity for Distributor to meet the demand on its system, Distributor may, by an allocation method deemed equitable by Distributor, fix the amount of electricity to be made available for use by Customer and/or may otherwise restrict the time during which Customer may make use of electricity and the uses which Customer may make of electricity. If such actions become necessary, Customer may request a variance because of unusual circumstances including matters adversely affecting the public health, safety and welfare. If Customer fails to comply with such allocation or restriction, Distributor may take such remedial actions as it deems appropriate under the circumstances including temporarily disconnecting electric service and charging additional amounts because of the excess use of electricity. The provisions of the Section entitled *Interruption of Service* of this Schedule of Rules and Regulations are applicable to any such allocation or restriction.

16. *Voltage Fluctuations Caused by Customer.* Electric service must not be used in such a manner as to cause unusual fluctuations or disturbances to Distributor's system. Distributor may require Customer, at his own expense, to install suitable apparatus which will reasonably limit such fluctuations.

17. *Additional Load.* The service connection, transformers, meters, and equipment supplied by Distributor for each Customer have definite capacity, and no addition to the equipment or load connected thereto will be allowed except by consent of Distributor. Failure to give notice of additions or changes in load, and to obtain Distributor's consent for same, shall render Customer liable for any damage to any of Distributor's lines or equipment caused by the additional or changed installation.

18. *Standby and Resale Service.* All purchased electric service (other than emergency or standby service) used on the premises of Customer shall be supplied exclusively by Distributor, and Customer shall not, directly or indirectly, sell, sublet, assign, or otherwise dispose of the electric service or any part thereof.

19. *Notice of Trouble.* Customer shall notify Distributor immediately should the service be unsatisfactory for any reason, or should there be any defects, trouble, or accidents affecting the

supply of electricity. Such notices, if verbal, should be confirmed in writing.

20. *Non-Standard Service.* Customer shall pay the cost of any special installation necessary to meet his peculiar requirements for service at other than standard voltages, or for the supply of closer voltage regulation than required by standard practice.

21. *Meter Tests.* Distributor will, at its own expense, make periodical tests and inspections of its meters in order to maintain a high standard of accuracy. Distributor will make additional tests or inspections of its meters at the request of Customer. If tests made at Customer's request show that the meter is accurate within two percent (2%), slow or fast, no adjustment will be made in Customer's bill, and the testing charge of One Dollar ($1.00) per meter will be paid by Customer. In case the test shows meter to be in excess of two percent (2%) fast or slow, an adjustment shall be made in Customer's bill over a period of not over thirty (30) days prior to date of such test, and cost of making test shall be borne by Distributor.

22. *Relocation of Outdoor Lighting Facilities.* Distributor shall, at the request of Customer, relocate or change existing Distributor-owned equipment. Customer shall reimburse Distributor for such changes at actual cost including appropriate overheads.

23. *Billing Adjusted to Standard Periods.* The demand charges and the blocks in the energy charges set forth in the rate schedules are based on billing periods of approximately one month. In the case of the first billing of new accounts (temporary service, cotton gins, and other seasonal customers excepted) and final billings of all accounts (temporary service excepted) where the period covered by the billing involves fractions of a month, the demand charges and the blocks of the energy charge will be adjusted to a basis proportionate with the period of time during which service is extended.

24. *Scope.* This Schedule of Rules and Regulations is a part of all contracts for receiving electric service from Distributor, and applies to all service received from Distributor, whether the service is based upon contract, agreement, signed application, or otherwise. A copy of this schedule, together with a copy of Distributor's Schedule of Rates and Charges, shall be kept open to inspection at the offices of Distributor.

25. *Revisions.* These Rules and Regulations may be revised, amended, supplemented, or otherwise changed from time to time, without notice. Such changes, when effective, shall have the same force as the present Rules and Regulations.

26. *Conflict.* In case of conflict between any provision of any rate schedule and the Schedule of Rules and Regulations, the rate schedule shall apply.

RESOLUTION

BE IT RESOLVED by the Board of Public Utilities of the City of Alcoa as follows:

Section 1: That it is the policy of the Board of Public Utilities of the City of Alcoa that prior to discontinuance of service of a customer for non-payment of electric bills, that the customer be given written notice that the customer will have the right to an administrative hearing in the event that there is a dispute as to the amount of said bill.

Section 2: That the Manager of Blount Electric System designate in writing the persons authorized to conduct such administrative hearings and to correct any errors in billing.

Adopted this the 30th day of March, 1979.

MANAGEMENT DIRECTIVE NO. 1

April 2, 1979

Subject: Administrative Hearings on Electric Bill Disputes.

In accordance with a resolution adopted by the Board of Public Utilities on March 30, 1979 regarding the above referenced subject, the following persons are authorized to conduct administrative hearings on disputes in the amount of electric bills, and to make appropriate corrections or adjustments as may be indicated by the facts revealed.

Office and Finance Manager	T. O. Hester
Plant Accountant	G. Addison West
Customer Service Clerk	Norma Holingsworth
Customer Service Clerk	Dorothy Leonard

/s/D. W. Switzer
General Manager

AFFIDAVIT OF LARRY FRYE

STATE OF TENNESSEE)
COUNTY OF KNOX) SS

Personally appeared before me the undersigned authority a Notary Public in and for said state and county, Larry Frye who made oath that he is a security consultant for the Knoxville Utilities Board, Knoxville, Tennessee; that his duties as security consultant include the investigation of property of the Knoxville Utilities Board which has been stolen; that according to the records of the Knoxville Utilities Board a Duncan meter with the manufacturers serial number of 10911905 and a Knoxville Utility Board number of B2E8-54212 was placed at a residence on Armstrong Street in Knoxville, Tennessee in 1979; that sometime between June 30, 1981 and August 1981, this meter was missing from said residence; that the Affiant examined the meter in the possession of David W. Switzer, Manager of power of the Alcoa Utilities Board; that said meter is the same meter which was missing from the Armstrong Street residence in Knoxville; and that said meter belongs to the Knoxville Utilities Board and was taken without any authority.

/s/ Larry W. Frye

Subscribed and sworn to before me on this the 13 day of Sept., 1983.

/s/ Walter A. Bearden
Notary Public

My commission expires:
Feb. 18, 1986

APPENDIX G

OTHER STATES WITH STATUTES DEALING WITH ELECTRICITY/UTILITIES DIVERSION/THEFT/TAMPERING WITH METERS, AS FOLLOWS:

1. Available statutes for prosecution of electricity theft
   a. Special statutory provision for prosecution of electricity theft/meter tampering - Ariz. Rev. Stat. §13-1601 *et seq.* (criminal damage statutes); Cal. Penal Code §499a; Fla. Stat. Ann. §812.14; Ga. Code §16-7-25(a); Haw. Rev. Stat. §708-825 *et seq.* (criminal tampering statute); Idaho Code §18-4621 *et seq.*; Ill. Ann. Stat. 38 ¶16-11; Kan. Crim'l Code §17-1921; La. Rev. Stat. §14.67.6; Ann. Code Md. Art. 27, §194; Mass. Gen. Laws Ann. ch. 164 §127; Mich. Comp. Laws §750.282; Miss. Code Ann. §97-25-1; Ann. Mo. Stat. §569.090; Rev. Stat. Neb. §28-515; Nev. Stat. §704.800; N.H. Rev. Stat. Ann. §539:7; N.J. Stat. Ann. §2C: 20-8; N.Y. Penal Law §165.15; N.C. Gen. Stat. §14-151; Ohio Rev. Code Ann. §§4933.18, 4933.19; Okla. Stat. tit. 76 §23; P. Rico code tit. 33 §1695; R.I. Gen. Laws §11-35-8 *et seq.*; S.C. Code §§16-13-380, 385; Tenn. Code Ann. §§39-3-938, 939; Va. Code §18.2-163; V.I. Code tit. 14 §1263; W. Va. Code §§61-3-44, 45; Wis. Stat. Ann. §941.36; Wyo. Stat. §§37-12-115, 116.

   b. Theft of services statutes expressly contemplating electricity theft - Conn. Gen'l Stat. §53a - 119(7)(3); Del. Code Ann. tit. 11 §845; D.C. Code §22-3811, *et seq.*; Burns Ind. Stat. Ann. §35-43-5, *et seq.*; Ky. Stat. Ann. §514.010, *et seq.*; Me. Rev. Stat. Ann. tit. 17A §357A; Or. Rev. Stat. §164-125; Pa. Stat. Ann. tit. 18 §3926; Utah Code Ann. §76-6-409 *et seq.*; Wash. Rev. Code §9A.56.010.

   c. Special statutory provisions accompanied by theft of services statutes expressly contemplating electricity theft - Compare - Me. Rev. Stat. Ann. tit. 17A §357A with tit. 17A §2353; Ann. Code Md. Art. 27 §194 with Art. 27 §340 *et seq.*; N.H. Rev. Stat. Ann. §539:7 with §637:1 *et seq.*; Wis. Stat. Ann. §941.36 with §943.20 *et seq.*

d. Statutes explicitly contemplating wiretap/destruction of property - Ark. Stat. Ann. §35-304; Ga. Code §16-7-25(a); Kan. Crim'l Code §17-1921; Me. Rev. Stat. Ann. tit. 17A §805; Miss. Code Ann. §97-25-1; Nev. Stat. §704.800; N.J. Stat. Ann. §2C: 20-8; N.D. Cent. Code 12.1-21-06, 12.1-23-03; Ohio Rev. Code Ann. §§4933.18 & 4933.19; Okla. Stat. tit. 76, §23; P. Rico Code tit. 33 §1695; S.C. Code §§16-13-380 *et seq.*; Tenn. Code Ann. §§39-3-938-939; V.I. Code tit. 14 §1263; W. Va. Code §§61-3-44, 45; Wyo. Stat. §37-12-115.

e. Noteworthy aspects of certain statutes - Ariz. Rev. Stat. §40-431 (misdemeanor to interfere with utility's agent examining property for ascertaining quantity of product consumed); Ohio Rev. Code Ann. §4933.19 (utility to notify customer annually of consequences of tampering); Pa. Stat. Ann. tit. 18 §3926(e) (illegal to advertise or dispense device or instructions for tampering); Utah Code Ann. §76-6-409(1)(a) (illegal to possess or make any instrument for tampering).

2. Statutory presumptions - Conn. Gen. Stat. §53a - 119(7); Del. Code Ann. tit. 11 §845; Ga. Code §16-7-25(b); Idaho Code §18-4621 *et seq.*; Kan. Crim'l Code §17-1921; La. Rev. Stat. §14.67.6; Ann. Code Md. Art. 27 §194; Mich. Comp. Laws §750.282; Miss. Code Ann. §97-25-1; Nev. Stat. §704.800; N.J. Stat. Ann. §2C: 20-8; N.Y. Penal Law §165.15; N.C. Gen. Stat. §14-151; Ohio Rev. Code Ann. §§4933.18, 4933.19; Pa. Stat. Ann. tit. 18 §3926; R.I. Gen. Laws §11-35-8 *et seq.*; S.C. Code §§16-13-380, 385; Tenn. Code Ann. §§39-3-938, 939; Va. Code §18.2-163; Wis. Stat. Ann. §941.36.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

Supreme Court, U.S.
FILED
JUN 28 1985
ALEXANDER L. STEVAS
CLERK

(2)

No. 84-1880

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

—o—

CITY OF ALCOA and DAVID SWITZER, manager of Blount Electric System and employee of the CITY OF ALCOA,

Petitioners,

vs.

ELIZABETH MYERS, on behalf of herself and her three minor children, DEBBIE LYNN DIXON, JOHN GARFIELD DIXON, JR., and CONNIE SUE DIXON,

Respondents.

—o—

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

—o—

RESPONDENTS' BRIEF IN OPPOSITION

—o—

Gary D. Housepian
Knoxville Legal Aid Society, Inc.
502 South Gay Street, Suite 404
Knoxville, Tennessee 37902
(615) 974-5241

Attorney for Respondents

RESPONSE TO QUESTIONS PRESENTED

1. The Sixth Circuit's decision did not hold that a customer of a municipally owned public utility has a property right in receiving stolen electricity.

2. The Sixth Circuit held that a customer has a property right in receiving electricity from a municipally owned public utility and her service could not be terminated without any procedural safeguards to protect her right. The Sixth Circuit did not prohibit the public utility from removing from its line a meter not installed by the utility company and replacing with its own meter.

3. The Sixth Circuit can make determinations on issues of law pertaining to the public utility's liability.

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No. 84-1880

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

—0—

CITY OF ALCOA and DAVID SWITZER, manager of Blount Electric System and employee of the CITY OF ALCOA,

Petitioners,

vs.

ELIZABETH MYERS, on behalf of herself and her three minor children, DEBBIE LYNN DIXON, JOHN GARFIELD DIXON, JR., and CONNIE SUE DIXON,

Respondents.

—0—

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

—0—

RESPONDENTS' BRIEF IN OPPOSITION

—0—

To the Honorable Supreme Court of the United States:

Elizabeth Myers, on behalf of herself and her three minor children, Debbie Lynn Dixon, John Garfield Dixon, Jr., and Connie Sue Dixon, ("Myers"), pray that the Petition for a Certiorari to Review the Judgment of the United States Court of Appeals for the Sixth Circuit reported at 752 F.2d 196 filed in the above entitled case by the Petitioners, City of Alcoa and David Switzer, manager of the Blount Electric System and employee of the City of Alcoa, ("City"), on January 9, 1985, with an Order denying the Petition for rehearing entered on March 6, 1985, be denied.

OPINIONS BELOW

The City correctly present the status of the opinions below in their Petition for a Writ of Certiorari.

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JURISDICTION

The Judgment of the Sixth Circuit was filed on January 9, 1985. The Order denying the Petitioner for Rehearing was entered on March 6, 1985. The jurisdiction of this Court has been invoked under 28 USC 1254(a). The Petition for a Writ of Certiorari should be denied in accordance with Supreme Court Rule 17.

———0———

CONSTITUTIONAL QUESTION INVOLVED

This 42 U.S.C. § 1983 case concerns the "property right" in the continued receipt of electrical service and procedural "due process" rights under the Fourteenth Amendment to the Constitution of the United States.

———0———

STATEMENT OF THE CASE

The City accurately present the proceedings through the District Court level in their Statement of the Case. However, the City's summary of the Sixth Circuit's decision is erroneous and misleading. For these reasons, the Statement of the Case is corrected with the following summary to describe the Sixth Circuit proceedings.

On appeal, the Sixth Circuit reversed the summary judgment awarded to the City. The Sixth Circuit based its decision upon the Tennessee law announced in Trigg v. Middle Tennessee Electricity Membership Corp., 533 S.W.2d 730 (Tenn. App. 1975), cert. denied, (Tenn. S.Ct. March 15, 1976) [hereinafter referred to as Trigg] and interpreted by this Court in Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 98 S. Ct. 1554, 56 L.Ed.2d 30 (1978) [hereinafter referred to as Craft]. The Sixth Circuit held that a recipient of electric service in Tennessee has a property right in the continuation of electric service because it cannot be terminated except "for good and sufficient cause." The property interest was the right to receive continued electrical service, for which Myers was willing to pay, and not the right to any tangible property (such as the meter itself).

Myers' rights were violated when her service was terminated without any procedural safeguards to protect her right. The Sixth Circuit followed the holding in Craft instructing that, at a minimum, Myers should have been afforded notice of the proposed termination and opportunity to discuss the theft with the utility in an effort to resolve the problem before the scheduled termination. The Sixth Circuit's holding did not prevent the City from removing a stolen meter without a pretermination hearing. Alternatively, it was held that the City would not have created a hazard or violated the law by removing the stolen meter, providing another meter, and resuming service to Myers. The case was reversed and remanded with instructions to enter an order accordingly and to determine the damages, if any, to which Myers were entitled.

A Petition for Rehearing was filed by the City. The City argued that the Sixth Circuit decided an issue which was not before it on appeal: the lack of knowledge of the theft device based upon the hearsay acquittal of the state criminal charge. The City further alleged that the decision of the Sixth Circuit deprived the City of its right to offer proof on the questions of both liability and damages. On March 6, 1985, the Sixth Circuit denied the Petition to Rehear. Judge Wellford concurred with the original opinion in this case that the District Court erred in granting the City's Motion for Summary Judgment. Judge Wellford stated that it is clear that Craft establishes a property interest in continued service and it was error to conclude that Myers had no property interest that deserved due process protection. However, Judge Wellford agreed with the City's contention that the case should be remanded for disposition on all issues, including the District Court making an initial determination of how much process was due and whether that standard was violated.

———o———

REASONS FOR DENYING THE WRIT

I.

THE SIXTH CIRCUIT HAS RENDERED A DECISION IN CONFORMITY WITH THIS COURT'S HOLDING IN MEMPHIS LIGHT, GAS & WATER DIVISION V. CRAFT.

The Sixth Circuit has simply followed the previous holding in Craft by this Court. The City's continued failure to understand the holding in Craft explains its inability to understand the Sixth Circuit decision. The City, in its brief at page 6, footnote 3, contends that Craft and Trigg stand for the proposition that a utility company is permitted to terminate service at will "if there is cause." Clearly, the City's interpretation contradicts itself and finds no support in Craft which reaffirmed that "[s]tate law does not permit a public utility to terminate service at will." Craft, 436 U.S. 1, 10.

This Court in Craft turned to Tennessee law announced in Farmer v. Nashville, 127 Tenn. 509, 515, 156 S.W. 189, 190 (Sup. Ct. 1912) and upheld in Trigg, 533 S.W.2d 730, 733, for a definition of the property right involved with regard to continued utility service. This Court held that:

> Because petitioners may terminate service only "for cause," respondents assert a "legitimate claim of entitlement" within the protection of the Due Process Clause. Craft, 436 U.S. 1, 11.

The City's argument attempts to avoid the force of the essential holding in Craft that a property right exists in the continued receipt of electricity. The City states that Trigg and Craft do not prevent a utility company terminate service for cause. [City's Brief, p. 6]. Clearly, these decisions recognize a customer's protected interest and the need for a due process hearing when the customer disputes the reason for termination. Craft, 436 U.S. 1.

Finally, it must be brought to this Court's attention that beginning in the Statement of the Case and throughout the petition for a Writ of Certiorari, the City mischaracterizes the Sixth Circuit decision as holding a customer of a municipally owned public utility has a property right in "stolen" electricity. The continual utilization of the term "stolen" electricity by the City incorrectly describes the Sixth Circuit decision.[1] The Sixth Circuit recognized that Myers continually claimed her lack of knowledge and participation in the removal and replacement of meter assigned to her. Additionally, there is nothing in the record from which it can be inferred that Myers refused to pay the reasonable estimated value of electricity consumed at her residence during the period in question. Moreover, the Sixth Circuit never held that they recognized a right in "stolen" electricity. The City makes no reference to any language in the Sixth Circuit decision to support this contention and carefully avoids recogni-

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1 The City objects to the consideration by the Sixth Circuit of the City's admission of Myers acquittal at the criminal trial of the criminal charges of the theft of the meter and electricity. However, the City continues to impute criminal intent and theft upon Myers with its use of the term "stolen" electricity.

tion of the Sixth Circuit discussion of the issue of stolen property. The Sixth Circuit held that the Myers' "property interest at stake was the right to receive continued electrical service, for which she was willing to pay, and not the right to any tangible property (such as the meter itself)." [City's Brief, App. 7] The City's characterization of the Sixth Circuit's decision is erroneous and misleading.

———0———

A. THE SIXTH CIRCUIT HAS NOT RENDERED A DECISION THAT CONFLICTS WITH THE PROVISIONS OF TENNESSEE STATUTES.

There is no conflict between the decisions of Craft and the Sixth Circuit with the Tennessee statutes. The City's contention that the Sixth Circuit ignored the law in Tennessee dealing with diversion of electric power in Sections 39-3-938 and 39-3-939 of Tennessee Code Annotated is without merit.

The Sixth Circuit recognized Tennessee law, with specific reference to the provisions in the Tennessee statutes regarding charges of theft of power. In discussing the "risk of erroneous deprivation" result under the due process standard set forth in Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed. 2d 18 (1976), the Sixth Circuit made reference to the civil remedies available to the City under Tennessee Code Annotated §§ 39-3-938 and 39-3-939. They can pursue civil remedies, including treble damages for electricity which has been pirated. Thus, the City has adequate remedies to protect its interest under the Tennessee statutes and this was clearly recognized by the Sixth Circuit.

The City argues that the probability of erroneous deprivation is nonexistent in this case. [City's Brief, p. 9]. As stated by the Sixth Circuit, the probability of erroneous deprivation is self-evident. As was determined at the criminal trial four months after her electrical service was disconnected and admitted by the City, Myers was not guilty of the theft of electricity. The Sixth Circuit held the risk of erroneous deprivation under the City's "current

system is great to the customer, while virtually a nullity as far as the defendant supplier is concerned." [City's Brief, App. 6]. The Sixth Circuit recognized the alternative remedies available to the City to protect its interests through the Tennessee Code sections. The decisions of Craft and the Sixth Circuit are consistent in their protection of the City's interest and the consumer's rights under the Fourteenth Amendment.

There is no conflict between the remedies and provisions of the Tennessee Code and the Sixth Circuit's decision. There is a conflict between the City's actions of depriving utility services for four months without a hearing and the Fourteenth Amendment to the United States Constitution. The City's own remedy of punishing a customer with deprivation of essential utility services is precisely the type of action that the Fourteenth Amendment and Craft prohibit. Additionally, the Tennessee statutes do not permit the type of punishment levied by the City in withholding of essential utility services for four months until Myers obtained her acquittal. The due process rights of citizens were not eliminated by the criminal statutes. These provisions do not provide authority for the City to terminate and withhold essential services without providing a customer the opportunity to respond to the charges of theft.

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B. THE SIXTH CIRCUIT HAS NOT RENDERED A DECISION WHICH CONFLICTS WITH DECISIONS OF THIS COURT REGARDING SUMMARY ADMINISTRATIVE ACTION.

The City argues that the Sixth Circuit ignored case authority from this Court regarding summary administrative actions that are proper by governmental entities without a pretermination due process hearing. The City parades a list of cases to this Court for its contention that it should be allowed to summarily terminate utility services. The Sixth Circuit stated that the City's use of telephone cases were a poor analogy to support this summary administrative action and reminded the City that the termination of telephone service does not usually create the same health hazard as termination of water or electricity.

As stated in Craft, this Court took judicial notice that "[t]he customer's interest is self-evident," as "[u]tility service is a necessity of modern life," the discontinuance of which "for even short periods of time may threaten health and safety." Craft, 436 U.S. 1, 18. Clearly, this Court recognized the important property interest involved with utility services necessitating due process protections. Moreover, the general rule is that before an individual is deprived of a significant property interest, he must be afforded an opportunity for a hearing. Board of Regents v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Wolff v. McDonnell, 418 U.S. 539, 557-558, 94 S. Ct. 2963, 41 L.Ed.2d 935 (1974).

The City contends that the three pronged test of Mathews, supra, was ignored or misapplied by the Sixth Circuit [City's Brief, p. 10]. This argument is without merit and ignores the thorough consideration of Mathews by the Sixth Circuit in its decision. [This discussion by the Sixth Circuit can be reviewed in City's Brief, App. 5-7]. Clearly, as found by this Court in Craft, the termination of utility services require some kind of procedural safeguards when there is a dispute over the cause for termination. Craft, 436 U.S. 1, 18.

The City concludes with its lament that the Sixth Circuit's decision prevents them from stopping the commission of a continuing crime. [City's Brief, p. 12-13]. The City continues to allege that Myers was committing the crime of stealing electricity and failure to terminate services would have allowed a crime to continue. This argument was raised previously by the City when it cited the case of Jackson v. Davis, 530 F.Supp. 2 (E.D. Tenn., 1981), aff'd without opinion, 667 F.2d 1026 (6th Cir. 1981). The Sixth Circuit's holding does not constitutionally require a due process hearing before a utility company may stop the commission of a continuing crime. The Sixth Circuit held that Myers disputed the cause for termination (she denied she was stealing electricity or stole the City's meter) and the City would not have created a hazard or violated the law by resuming service if it had provided another

meter. Clearly, the City could simply replace the foreign meter with another meter and provided notice of a due process hearing within the next day or two regarding its allegation of theft by Myers. The City admitted that it has a hearing mechanism in place for disputed bill issues. [City's Brief, App. 24]. Instead the City removed the stolen meter without replacement for four months and without providing a due process hearing. Finally, the Sixth Circuit noted that this is not a case involving a continued illegality because Myers informed the City of her intent to continue to pay for the service.

C. THE SIXTH CIRCUIT HAS NOT RENDERED A DECISION OF SUCH GENERAL IMPORTANCE TO THE NATIONAL LAW THAT THIS CONSTITUTIONAL QUESTION SHOULD BE SETTLED BY THIS COURT.

The Sixth Circuit has merely restated the clear holdings in Craft that a property right exists in the continued receipt of electricity. Myers should have been afforded notice of the proposed termination and the opportunity to discuss the theft with the utility in an effort to resolve the problem before the scheduled termination. Myers disputed that she had knowledge or participated in the entire affair. Her rights were violated when her service was terminated without any procedural safeguard to protect her rights.

The Sixth Circuit's decision does not prevent a utility company stopping crime. The City was provided options, including the opportunity to remove he stolen meter and replace it with its own meter without any interruption of ervice. Additionally, the City could have charged Myers the reasonable value an estimated amount of electricity consumed at her residence during the per- in question. The City has never alleged that this could not be done. arly, the City could have held a due process hearing after notice under its ring mechanism already in place with no additional burden. [City's Brief, . 6, 19].

The City's allegation of the impact on Tennessee's criminal statutes and other states is without merit. As the Sixth Circuit reminded the City, there are adequate provisions under the statute for remedies to the utility companies. Tennessee Code Annotated § 39-3-938 and § 39-3-939. The Sixth Circuit does not prevent the City or utility companies in other states from terminating service after a due process hearing or pursuing remedies under the criminal statutes. There is no conflict in the Tennessee statutes with Craft, the Fourteenth Amendment, or the Sixth Circuit decision. Moreover, there is not any conflict that the City can pinpoint in other states that supports its claim of such general importance to the national law.

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II.

THE SIXTH CIRCUIT HAS RENDERED A DECISION IN CONFORMITY WITH PRIOR DECISIONS OF THIS COURT AND SETTLED APPELLATE PRACTICES OF THE UNITED STATES COURTS OF APPEAL.

The Sixth Circuit's holding is in conformity with the practice of the Court of Appeal and this Court. The City argues that the Sixth Circuit could not decide what process was due. This Court in Craft provided the minimum standards of due process. These standards, as a matter of law, were violated by the City's own admission. It is undisputed that no due process hearing or any procedural safeguards were afforded to Myers. Craft, instructs that at a minimum, Myers should have been afforded notice of the proposed termination and the opportunity to discuss her lack of knowledge and participation in the theft with the utility in an effort to resolve the problem before the scheduled termination. Craft, 436 U.S. 1, 18. The City admitted and stipulated that it afforded no notice or opportunity for a hearing to Myers prior to the termination of utility services. [City's Brief, App. 17]. Therefore, due process was not provided as a matter of law.

This admission and undisputed fact permits the Sixth Circuit to simply reverse and remand with instructions to the district court to determine the damages, if any, to which Myers may be entitled. The authority relied upon by the City for a remand are only persuasive when a factual dispute exists between the parties. The record below reflects no disputed issue of fact. Judicial economy requires the appellate court to dispose of the matter when the correct resolution is clear. Levin v. Mississippi River Fuel Corp, 386 U.S. 162,, 170, 87 S. Ct. 927, 17 L.Ed.2d 834 (1967); In re Hronek, 563 F.2d 296, 298 (6th Cir. 1977); Wulff v. Singleton, 508 F.2d 1211, 1214 (8th Cir. 1975). The record permits only one resolution of the factual issue and the appellate court may make the appropriate finding without a remand. Pullman-Standard v. Swint, 456 U.S. 273, 292, 102 S. Ct. 1781, 72 L.Ed.2d 66 (1982). Moreover, the Sixth Circuit has the power to dispose of the matter under 28 U.S.C. § 2106, particularly, as in the instant case, where the parties cross moved for summary judgment in the lower court and the relevant legal questions have been fully briefed and argued on appeal. Independent Bankers Association of America v. Heimann, 613 F.2d 1164, 1167 (D.C. Cir. 1979); Morgan Guaranty Trust Company of New York v. Martin, 466 F.2d 593, 599 (7th Cir. 1979).

The City also complains of not being provided the opportunity to offer proof on the liability question at trial. It is ironic that the City requests this opportunity while it maintains that Myers should not be provided the opportunity to dispute her liability. The critical difference is that Myers disputes her culpability while the City has admitted their liability. The City has admitted that no notice or opportunity of a hearing was provided, utility services were discontinued, and the resumption of services was refused. The requirements of due process minimal standards have been violated by the City and the Sixth Circuit has the power to grant summary judgment in favor of Myers.

The Court of Appeals has ruled in conformity with the decisions of this Court and other Courts of Appeal.

———0———

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

GARY D. HOUSEPIAN
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Attorney for Respondents,
Elizabeth Myers, on behalf of herself and her three minor children, Debbie Lynn Dixon, John Garfield Dixon, Jr., and Connie Sue Dixon.

No. 84-1880

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1984

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CITY OF ALCOA and DAVID SWITZER, manager of Blount Electric System and employee of the CITY OF ALCOA,

Petitioners,

vs.

ELIZABETH MYERS, on behalf of herself and her three minor children, DEBBIE LYNN DIXON, JOHN GARFIELD DIXON, JR., and CONNIE SUE DIXON,

Respondents.

—0—

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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CERTIFICATE OF SERVICE

—0—

I, Gary D. Housepian, counsel for the Respondents, and a member of the Bar of the Supreme Court of the United States, do hereby certify that three (3) copies of the Supplemental Affidavit was mailed, first-class postage prepaid to Carl P. McDonald, counsel for City of Alcoa and David Switzer at his offices at First Tennessee Bank Building, Maryville, Tennessee 37803, and three (3) copies to Carlos C. Smith, counsel for Amicus Curiae, 400 Krystal Building, One Union Square, Chattanooga, Tennessee, 37402, and that all parties required to be served have been served, this 5th day of July, 1985.

Gary D. Housepian

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MOTION FILED
JUN 26 1985

No. 84-1880

IN THE

Supreme Court of the United States

October Term, 1984

CITY OF ALCOA and DAVID SWITZER, manager of Blount Electric System and employee of the CITY OF ALCOA
Petitioners

v.

ELIZABETH MYERS, on behalf of herself and her three minor children, DEBBIE LYNN DIXON, JOHN GARFIELD DIXON, JR., and CONNNIE SUE DIXON,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE TENNESSEE VALLEY PUBLIC POWER ASSOCIATION IN SUPPORT OF PETITIONERS

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MOTION OF THE
TENNESSEE VALLEY PUBLIC POWER ASSOCIATION
FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE
IN SUPPORT OF THE PETITION
OF THE CITY OF ALCOA, ET AL.
FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The Tennessee Valley Public Power Association ("TVPPA") respectfully asks leave of the Court, pursuant to Rule 36, to file, as an amicus curiae in this case, the "Brief of Amicus Curiae Tennessee Valley Public Power Association in Support, etc.", filed conditionally this date, and appended to this motion. In support of its motion, TVPPA would show the Court that:

1. TVPPA is a non-profit Tennessee Corporation whose membership is composed of 157 of the 160 municipal and cooperatively owned, non-profit electric distribution systems that purchase electric power at wholesale from the Tennessee Valley Authority ("TVA"), an agency of the United States. These electric distribution systems are located in the TVA service area, which includes parts of Tennessee, Kentucky, Alabama, Georgia, Mississippi, North Carolina, and

Virginia. TVPPA's purpose is to promote the joint interests of its member systems and to act on their behalf in matters of joint concern, including those involving policies concerning the extension and termination of electric service, and the procedures incident to the extension and termination of electric service, which are at issue in this case. The ratepayers of the member systems of TVPPA own their respective distribution systems, either directly or through the municipalities of which they are citizens. The municipal electric system of the City of Alcoa is a member of TVPPA. TVPPA was authorized to seek leave to file a brief amicus curiae in this case by its Board of Directors on April 29, 1985.

2. TVPPA and its members are so situated that the disposition of this action may have a serious adverse impact upon their interests. TVPPA shares the concern of the City of Alcoa that the opinion of the Court of Appeals provides unwarranted protection to what is not a property interest under Tennessee law. In addition, as set forth in more detail in the accompanying brief, TVPPA is

particularly concerned that the opinion of the Court of Appeals may serve to establish due process requirements with respect to the termination of electric service that will impose undue burdens upon the 107 municipally-owned members of TVPPA.

3. Should the judgment of the Court of Appeals stand unmodified, many members of the TVPPA would be severely hampered in their efforts to combat energy theft. If the members of TVPPA were unable to protect their members from energy theft in a timely and effective manner, the resulting losses would necessarily be borne by the citizen ratepayers served by TVPPA's member systems. TVPPA thus has a direct interest in the subject matter of this action, and the disposition of this action may as a practical matter impair the ability of TVPPA, and its members, to protect that interest.

Accordingly, TVPPA respectfully requests leave of the Court to file the accompanying Brief of Amicus Curiae Tennessee Public Power Association in this matter.

Respectfully submitted,

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BRIEF OF AMICUS CURIAE
TENNESSEE VALLEY PUBLIC POWER ASSOCIATION
IN SUPPORT OF THE PETITION OF
THE CITY OF ALCOA, ET AL.
FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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INTERESTS OF AMICUS CURIAE

Consent to the filing of this brief was refused by counsel for the plaintiff-respondents, Elizabeth Myers, et al. Accordingly, this brief is submitted conditionally, accompanied by a motion seeking leave that it be filed, pursuant to Rule 36.1 of this Court.

As set forth in the Motion referred to, the Tennessee Valley Public Power Association ("TVPPA") is a nonprofit Tennessee corporation whose membership is composed of 157 of the 160 municipally and cooperatively owned nonprofit electric distribution systems that purchase electric power at wholesale from the Tennessee Valley Authority ("TVA"), an agency of the United States. These electric distribution systems are located in the TVA service area, which includes parts of Tennessee, Kentucky, Alabama, Georgia, Mississippi, North Carolina, and Virginia. TVPPA's purpose is to promote the joint interests of its member systems, and to act on their behalf in matters of joint concern. In the context of the instant case, TVPPA is concerned that the

decision of the Court of Appeals will place unreasonable, unrealistic, and unjustified burdens on the 107 municipal electric systems that are members of TVPPA.

The decision of the Court of Appeals purports to set forth due process standards for the termination of electric service in cases in which electric service is being stolen at the residence of the recipient of the benefit of the stolen power. TVPPA believes that the Court of Appeals established these due process standards without an adequate review of the particular benefits and burdens that the implementation of such standards in the context of theft of power cases would entail, and TVPPA believes that an examination and weighing of these benefits and burdens is necessary to establish the proper due process standard to be applied in cases of theft of power.

TVPPA supports the position of the City of Alcoa that the plaintiff-respondents in this action, Elizabeth Myers, et al., had no protected property interest in the continued receipt of electric service under the particular circumstances of this case. This argument

has been adequately advanced in detail by the City of Alcoa in its petition before this Court. In this brief, TVPPA wishes to highlight for the Court's attention the particular problems posed by the failure of the Court of Appeals to make an adequate evaluation of the benefits and burdens flowing from the due process standard that it has mandated. The failure not only poses risk to the City of Alcoa, but also to other municipal electric distributors, many of whose individual circumstances may differ markedly from that of the City of Alcoa. The analysis of the Court of Appeals fails to consider such differing circumstances or to appreciate this diversity, and thus threatens to impose unreasonable and unjustified burdens upon the municipal electric distributors who are members of TVPPA.

SUMMARY OF THE ARGUMENT

The Court of Appeals set forth a due process standard for the termination of electric service in cases involving theft of electric power. The Court of Appeals established this due process standard

without an adequate analysis of the particular benefits and burdens that would flow from the implementation of such a due process standard, and without an adequate record upon which to make such an analysis. The imposition of a standard of due process without examination of the factual circumstances of the particular case before the Court is contrary to the principles established by the cases decided by this Court. No such due process standards should be imposed without permitting the City of Alcoa to establish a record in the District Court showing the relative benefits and burdens that the implementation of particular due process procedures would entail.

ARGUMENT

The memorandum decision of the District Court Judge from which plaintiffs Ms. Myers, et al., appealed is included as Appendix C in the Petition of the City of Alcoa. As noted by the District Judge, the case was "before the Court on Defendants' [City of Alcoa, et al. (hereinafter Alcoa)] motion for summary judgment." Previously,

the motion of the plaintiffs for summary judgment had been denied, and the plaintiffs did not appeal from that denial. The District Judge granted the motion of Alcoa for summary judgment, finding that the plaintiffs had been deprived of no property interest entitled to due process protection.

In reaching that conclusion, the District Judge had no cause to consider, or to address the adequacy of, the procedures actually employed by the City of Alcoa in terminating the electric service of the plaintiffs. By finding that the plaintiffs had no protected property interest in the continued receipt of electricity under the stipulated facts, the District Judge found that the plaintiffs had no cause of action regardless of the procedures employed by the defendants or what other facts might be shown.

The Court of Appeals reversed. In an extended discussion, the Court of Appeals determined that the plaintiffs had a right to the receipt of continued electric service that rose to the dignity of a "protected property interest", of which the Court concluded the plaintiffs had been

deprived when their electric service was terminated by Alcoa. TVPPA fully concurs with the position of Alcoa that this holding is incorrect and agrees with the discussion of this point by Alcoa in its Petition to this Court.

The determination by the Court of Appeals that there was a property interest in the stolen electricity removed the basis for the District Court's grant of summary judgment in favor of the defendants, leaving a blank slate. The proper procedure would then have been to remand the case to the District Court for a trial on the merits, or such other proceedings as might prove appropriate. The Court of Appeals did not remand for a trial on the merits. Rather, it went on to make a finding on liability in favor of the plaintiffs and remanded for a trial on the question of damages only. The Court of Appeals held that Myers was, at a minimum, entitled to notice and a hearing before electric service was terminated. As it had been stipulated that no pretermination hearing had been granted, the Court of Appeals presumably believed that this holding was an inescapable question of law.

However, in its finding of liability, the Court of Appeals had actually passed upon a question of fact, not of law. Once a protected property interest has been found, the adequacy of the procedures put in place to protect that interest is, initially, a question of fact, to be determined in part by a consideration of the circumstances of the particular case. Due process is a flexible standard, and its precise requirements vary with the exigencies of the particular situation. As noted in the case of Mathews v. Eldridge, 424 U.S. 319 (1976), the nature of the judicial or administrative process required in a given case calls for a consideration of:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of that interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interests, including the function involved and the fiscal

> and administrative burdens that the additional or substitute procedural requirements would entail.

424 U.S. at 355.

In holding that the plaintiffs were entitled to a pretermination hearing, the Court of Appeals failed to employ this analysis correctly, and failed to appreciate the factual issues that a proper consideration of the factors set forth in Mathews v. Eldridge raises.

Assuming, for the purposes of argument only, the possession by the plaintiffs of a protected property interest in the continued receipt of stolen electric service, the problems with the analysis employed by the Court of Appeals begin with the second Mathews v. Eldridge factor, the "risk of erroneous deprivation . . ." At no point does it appear that the Court of Appeals considered the risk of error inherent in a procedure which fails to provide a pretermination hearing. Rather, the Court of Appeals appeared, first, to have mistakenly concluded that the risk of error in the procedure employed by Alcoa must be

unacceptably high because it produced an incorrect result in this particular case. Next, the Court of Appeals appeared to support this conclusion by its estimate of the impact an error would have on the parties, considerations more relevant to the other prongs of the Mathews test. Amicus curiae suggests that this is a clear misapplication of this prong of the Mathews test.

That a particular procedure in fact results in mistaken deprivation in one case does not establish that the risk of erroneous deprivation entailed in the use of the procedure is unacceptable. As noted by this Court in Mathews, ". . . procedural due process rules are shaped by the risk of error inherent in the truthfinding process as applied to the generality of the cases, not the rare exceptions". Mathews v. Eldridge, 424 U.S. 319, 344 (1976). Nothing in either Mathews v. Eldridge, 424 U.S. 319 (1976), or the other opinions of this Court suggests that the administrative procedures adopted must always be error-free and never result in an erroneous deprivation. "The Fourteenth Amendment does not guarantee that all

decisions by state officials will be correct. . ." Lavine v. Milne, 424 U.S. 577, 587 (1976).

The Court of Appeals had no record upon which to consider the many factual questions that a proper consideration of the issue of risk demands, and thus passed over it cursorily. But what is the risk of erroneous deprivation in the failure to give a pretermination hearing to a person receiving admittedly stolen electric power? Neither the Court of Appeals nor the parties question the obvious right of Alcoa to terminate electric service without a hearing if the plaintiffs had been themselves culpable of the theft. Thus, the question becomes, in what percentage of those cases of admitted theft of electricity will it be found that the person receiving the direct benefit of the stolen power has no knowledge of or involvement with the theft? It is this percentage, whatever it might be, that gives the "risk of erroneous deprivation", for only in those cases can the lack of a pretermination hearing have any deleterious impact on the customer. What is that risk? There is no evidence in this

record from which it can be determined. Logic suggests that it is small. Certainly, that has been the judgment of the Tennessee Legislature, which has created a legislative presumption that the recipient of the benefit of stolen power is guilty of theft. See T.C.A. §§ 39-3-938, 39-3-939. However, the record contains no facts upon which a reasoned judgment of the risk of erroneous deprivation can be based.

A second facet of this prong of the Mathews test, one not touched upon by the Court of Appeals, is "the probable value, if any, of additional or substitute procedural safeguards". Here, the additional safeguard mandated by the Court of Appeals is a pretermination hearing. To what extent will the institution of this particular procedure reduce the risk of erroneous deprivation? Again, the record is devoid of any evidence to support a finding on this point. However, the value of a pretermination hearing in a case involving admitted theft of power certainly is not readily apparent. It must be kept in mind that we are dealing only with cases in which the fact of theft is undisputed; the only possible question is

the involvement in that theft of the recipient of the stolen power. How will a pretermination hearing distinguish between recipients who are thieves and those who are not? As theft of power is a criminal offense, can it not be expected that all recipients of stolen power, both innocent and guilty, will protest their innocence? Furthermore, what is the scope of the pretermination hearing that would be required to provide any reasonable basis upon which to distinguish the guilty from the innocent? Only by knowing this scope can one decide whether or not the cost of the procedure to be implemented will be balanced by the benefits that flow from it. There is no basis in the record for deciding these questions, and it was error for the Court of Appeals to implicitly dismiss them out of hand.

The Court of Appeals appears to have assumed that, because Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1 (1978), required notice and a hearing in connection with an ordinary billing dispute, notice and a hearing were similarly required in a case of theft of power. As Judge Wellford of the Court of Appeals noted in his

concurrence with the Order of the Court of Appeals on the petition of Alcoa for a rehearing, included as Appendix B to the Petition of Alcoa before this Court, such an assumption is not necessarily warranted. A case involving theft of power is not the same as one involving a billing dispute, and at a minimum the case should have gone back to the District Court so that evidence of those differences could be considered.

The Court of Appeals also failed to appreciate the complexities inherent in making a judgment as to the administrative and fiscal burdens which the implementation of the mandated procedure would place on the utility, dismissing the question with the comment that the existing hearing mechanism designed to adjudicate conventional billing disputes could be employed with no additional burden to Alcoa. Such an assumption is unwarranted. As noted previously, it is not at all obvious that a procedure designed to resolve run-of-the-mill billing disputes and misunderstandings will be of any use in separating the innocent from the guilty in cases involving theft of power. There is

no discussion at all of what uncompensated loss the municipal power system could be expected to suffer by continuing to provide electric service to all in cases involving theft of power, pending a hearing to give the recipient of the theft an opportunity to claim innocence. The Court of Appeals alludes to the right of the defendants to pursue civil remedies to recover the charges for the power stolen, but there is nothing in the record to suggest that such civil actions are cost effective.

Once it is realized that the problems and costs posed by theft of power cases are not necessarily those presented in an ordinary billing dispute, and that the equivalence between the two assumed by the Court of Appeals does not in fact exist, there is no evidence in the record sufficient to support a reasoned judgment as to the fiscal and administrative burdens that the procedure required by the Court of Appeals would place on the municipal utility.

Certainly, there are numerous situations in which the deprivation of a protected property interest without a predeprivation hearing does not violate

due process requirements. The defendants have cited a number of illustrative cases in their Petition before this Court at pages 11-12. The holding by the Court of Appeals that such a predeprivation hearing was required in this case was grounded upon a number of assumptions for which there exists no basis in the present record. On the state of the record before it, the Court of Appeals could have decided, at most, that it could not be said as a matter of law that the lack of a pretermination hearing would be acceptable in all possible circumstances. The record does not justify the leap from that conclusion to the holding of the Court of Appeals that a pretermination hearing is always required. The decision of the Court of Appeals threatens to impose an unreasonable and unjustified administrative burden not only on the City of Alcoa, but on other municipal distributors of electric power.

CONCLUSION

For the reasons stated, amicus curiae the Tennessee Valley Public Power

Association asks that the Petition for Writ of Certiorari of the City of Alcoa, et al., be granted.

Respectfully submitted this 28th day of June, 1985.

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